




3 1761 11766577 8



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

SUMMARY

Hugh Barber, applicant.
Board File: 660-20
Decision no. 1000

This case deals with an application for exemption because of religious conviction or beliefs made pursuant to section 70(2) of the Code.

The Board concluded that section 70 does not apply to a person who is not yet employed and who is therefore not a member of a bargaining unit and not covered by a collective agreement.

The application is therefore dismissed.

RÉSUMÉ

Hugh Barber, requérant.
Dossier du Conseil: 660-20
Décision n° 1000

Il s'agit dans cette affaire d'une demande d'exemption en raison de croyances ou de convictions religieuses fondée sur le paragraphe 70(2) du Code.

Le Conseil décide que l'article 70 ne s'applique pas à une personne qui est sans emploi et qui n'est donc pas membre d'une unité de négociation et assujettie à une convention collective.

La demande est donc rejetée.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Hugh Barber,
applicant.

Board File: 660-20

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Mr. Michael Eayrs and Ms. Mary Rozenberg, Members.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

This is an application for exemption from any obligation to join a trade union or to pay regular union dues to a trade union, made under section 70(2) of Part I of the Canada Labour Code. The applicant seeks such an exemption on the basis of his religious conviction or beliefs.

Sections 70(1), (2) and (3) (it is unnecessary to set out section 70(4), which defines "registered charity" and "regular union dues") are as follows:

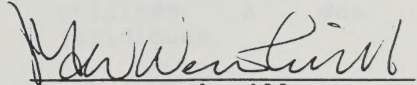
"70.(1) Where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union forthwith.

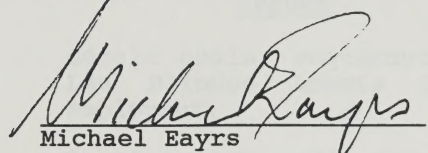
(2) Where the Board is satisfied that an employee, because of his religious conviction or beliefs, objects to joining a trade union or to paying regular union dues to a trade union, the Board may order that the provision in a collective agreement requiring, as a condition of employment, membership in a trade union or requiring the payment of regular union dues to a trade union does not apply to that employee so long as an amount equal to the amount of the regular union dues is paid by the employee, either directly or by way of deduction from his wages, to a registered charity mutually agreed on by the employee and the trade union.

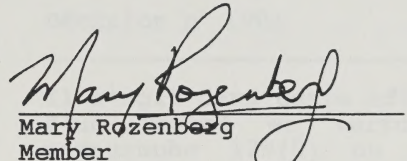
(3) Where an employee and the trade union are unable to agree on a registered charity for the purposes of subsection (2), the Board may designate any such charity as the charity to which payment should be made."

In our view, the foregoing provisions must be read as a whole, and on such a reading it is clear that section 70 contemplates the situation where an employee is, by virtue of the provisions of a collective agreement by which he or she is bound, required to join a trade union or to pay regular union dues to a trade union. In the instant case, the applicant is, as he states, seeking employment. He is not, as of the date of the application, employed, and is not subject to the terms of a collective agreement. He is not a member of a bargaining unit for which a trade union is the bargaining agent. He is not, therefore, in a situation to which the provisions of section 70 apply, and while his desire to have the matter of his potential obligation to pay union dues determined in advance may be understandable, the Code does not provide for the sort of one-party anticipatory proceeding which the applicant seeks.

The application is thus not one with which this Board has jurisdiction to deal, and is accordingly dismissed.


J.F.W. Weatherill
Chairman


Michael Eayrs
Member


Mary Rozenberg
Member

ISSUED at Ottawa, this 25th day of March 1993.

CLRB/CCRT - 1000

information

CAI
L100
-152

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

SUMMARY

Gérald Godin, applicant, and Loomis Armored Car Service Ltd., employer.

Board File: 950-253

Decision no. 1001

This case deals with a reference pursuant to section 129(5) of the Code of a decision of a safety officer who had concluded that the conditions in a work place did not constitute a danger to the employee.

The Board found that, for the purposes of section 129(2)(b), some conditions in the work place where the employee carried out his duties constituted a danger, and had not been assessed by the safety officer.

The reference is therefore allowed.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

RÉSUMÉ

Gérald Godin, requérant, et Les Blindés Loomis Ltée, employeur.

Dossier du Conseil: 950-253

Décision n° 1001

Il s'agit dans cette affaire d'un renvoi en vertu du paragraphe 129(5) du Code d'une décision d'un agent de sécurité qui avait conclu que le milieu de travail d'un employé ne présentait aucun danger.

Le Conseil décide que, selon l'alinéa 129(2)b), le milieu de travail dans lequel devait évoluer l'employé présentait des conditions dangereuses particulières qui n'avaient pas été appréciées par l'agent de sécurité.

Le renvoi est donc accueilli.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Gérald Godin,
applicant,
and

Loomis Armored Car
Service Ltd.,
employer.

Board File: 950-253

The Board consisted of Mr. J.F.W. Weatherill, Chairman, sitting as a single member pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. A.D. Smith, for the applicant;
Mr. D. Ponto, for the employer; and
Mr. Michel Labrecque, Labour Affairs Officer

Heard at Ottawa, March 4, 1993.

This is a reference pursuant to section 129(5) of Part II of the Canada Labour Code of a decision of a safety officer to the effect that there was "no danger" in the circumstances to be described.

On January 21, 1993, the applicant, Gérald Godin, was assigned to his usual work as a messenger, in armoured car delivery service. He had expected to work that day, as he usually did, as part of a three-man crew consisting of a driver, a guard and a messenger. On the day in question, the applicant was advised upon his arrival at work that the guard had "called in", and that a two-man crew would be used. The applicant inquired whether a two-way radio would be made available to him, and he was advised that it would be. A radio was provided, and the

applicant was given some brief instruction on its use. The applicant and his driver then began their work, and made a few stops for the pick-up or delivery of money or other valuables, before arriving at the Lester B. Pearson Building.

The Pearson Building contains the offices of the Department of External Affairs, and access to its rear parking lot is controlled by security guards, although they are not police officers and are not armed. According to the evidence, while the guards check passenger cars entering the parking lot, they are quite casual with respect to commercial vehicles which go in to the loading bays. There is also a security guard at the rear entrance to the building. Persons entering the building at the rear pass the security guard's office, but it does not appear from the evidence that there is any security check there, and it seems that the guard may not always be in the office. Persons entering the building then proceed along a corridor some 300 feet in length, and then take an elevator to the lobby of the building. The bank at which the applicant was to deliver or pick up money is on the lobby floor, opposite the elevator.

Until the day in question, the applicant was accompanied by a guard. On the day in question, there being no guard, the applicant, having first gone in to examine the premises prior to making any delivery, considered the situation to be dangerous, and called his supervisor to advise him of that. The matter was investigated promptly by an experienced safety officer, who concluded that there was no danger. This conclusion would appear to have been based primarily on the fact that there are

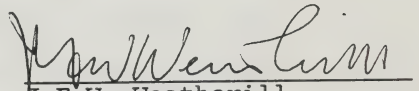
security guards at the Pearson Building. The safety officer did not, however, examine the corridor from the guard room to the elevator.

When the safety officer gave his decision, the applicant carried out his work at the Pearson Building, and went on to perform his duties at other locations in Ottawa that day. There is no suggestion that the applicant was acting from any ulterior motive, and the employer, quite properly, did not treat the matter as one calling for any sort of discipline.

The present decision does not deal with the matter of two-man crews on armoured vehicles in any general way. The Board is concerned only with the question which arises under section 129(2)(b) in this particular case, namely whether or not a condition existed in the place in respect of which the investigation was made (that is, the Pearson Building) that constituted a danger to the employee.

Mr. Godin's concern for his safety related to his transporting valuables down the lengthy corridor, access to which might or might not be controlled by the security guard, and while he was well out of sight of his driver. While Mr. Godin was armed, and while work procedures called for him to keep one hand on his gun, he was also pushing a dolly loaded with valuables, and was thus unable with any ease to remove his radio from its case, push the transmit button and make a call if urgent circumstances should require it. In any event, as he proceeded down the corridor, danger from behind him would increase, and the practical utility of his gun and his radio would be reduced.

In the Board's view, these circumstances were not safe ones for the performance of the work in question, and a dangerous condition did exist. This is not to say that the condition could only be relieved by the provision of a three-man crew. Different or enhanced security arrangements in respect of the particular location might well create conditions in which no danger would be found to exist. In the particular circumstances and at the particular time in question here, however, it is the Board's conclusion, for the reasons given above, that a condition existed at the place in which the investigation was made that constituted a danger to the employee. The reference is accordingly allowed.


J.F.W. Weatherill
Chairman

ISSUED at Ottawa, this 25 th day of March 1993.

CLRB/CCRT - 1001

CAI
L100
- I 52

information

This is not an official document. Only the Reasons for decision can be used for legal purposes.

Summary

C. Peretti et al, complainants, and International Association of Machinists & Aerospace Workers, Lodge 2323, bargaining agent, and Air Canada, respondent.

Board File: 950-180

Decision no.: 1002

These reasons deal with a complaint pursuant to Part II of the Canada Labour Code (Occupational Safety and Health) in which the complainants allege that the employer had violated section 147 by disciplining them for refusing certain training which, in their opinions, exposed them to danger.

The complaint was dismissed. The Board found that the complainants did not, in the circumstances, have "reasonable cause to believe" that a condition existed which constituted a danger to them, and found that the employer did not take disciplinary action prohibited by the Code.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé de décision

C. Peretti et autres, plaignants, et l'Association internationale des machinistes et des travailleurs de l'aérospatiale, section locale 2323, agent négociateur, et Air Canada, intimée.

Dossier du Conseil: 950-180

Décision n° 1002

Les présents motifs traitent d'une plainte déposée en vertu de la Partie II du Code canadien du travail (Sécurité et santé au travail) selon laquelle les plaignants allèguent que l'employeur a enfreint l'article 147 en leur imposant des mesures disciplinaires parce qu'ils ont refusé une formation qui, à leur avis, les exposait à un danger.

La plainte est rejetée. Le Conseil conclut que les plaignants, dans les circonstances, n'avaient pas de «motif raisonnable de croire» qu'il existait un danger pour eux, et il a jugé que l'employeur n'avait pas imposé aux plaignants de mesures disciplinaires interdites par le Code.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnements et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

C. Peretti et al.,

complainants,

and

International Association
of Machinists & Aerospace
Workers, Lodge 2323,

certified bargaining agent,

and

Air Canada,

respondent.

Board File: 950-180

The Board consisted of Mr. Michael Eayrs, Member, acting as a single member panel, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Heard at Toronto, October 2 and 3, 1991.

Appearances

Ms. Pamela Chapman, accompanied by Mr. Bill Shipman, for the complainants;

Mr. Guy Delisle, for the respondent.

This is a complaint filed pursuant to section 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health) in which the complainants, Messrs. Peretti, Baker and Barker, allege that Air Canada (the employer) contravened section 147(a) of the Code by improperly disciplining them for refusing, pursuant to section 128(1) of the Code, to work on November 28, 1990.

The pertinent provisions of section 147(a) of the Code states:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part;..."

The pertinent provisions of section 133 of the Code are:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) A complaint made pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint.

(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

The pertinent provisions of section 128 of the Code are as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or thing or to work in that place."

The circumstances giving rise to this complaint may be summarized as follows.

The three complainants are employed by Air Canada for various duties in connection with the servicing, at Toronto, of Air Toronto Jetstream aircraft.

Mr. Peretti is a lead station attendant, union shop steward and an active participant in and former co-chair of the applicable Joint Health and Safety Committee. Messrs. Baker and Barker are both station attendants. All three are represented by the International Association of Machinists and Aerospace Workers, Lodge 2323, which acted for them in these proceedings.

One of the duties that may be required of station attendants is the servicing of the lavatory reservoir units (lav service) of Jetstream aircraft. Messrs. Peretti and Barker had both performed the lav service required by Air Canada prior to November 28. Mr. Baker had not, although he had performed that type of work for a previous employer.

Prior to November 28, 1990, the lav service work required the station attendants to empty the lavatory reservoir unit (lav unit), which had been removed from the aircraft by maintenance personnel, into a mobile self-propelled service unit (lav cart); recharge the lav unit with fresh fluid (lav detergent) and leave it for reinstallation in the aircraft by maintenance personnel.

By about mid-November, the aircraft had been retro-fitted so that the lav units previously fastened in place in the aircraft by screws were fastened by clamps. Air Canada then decided that the entire servicing operation (removal,

dumping, recharging and replacing) of the lav units would be performed by station attendants. It may also be noted that at the same time the mobile lav cart referred to previously was replaced with a different type of mobile lav cart.

On November 27, 1990, some employees (station attendants) indicated to Air Canada that the work in question was not their work. Air Canada operations, having checked with its local labour relations manager, then posted a bulletin confirming that the work in question was indeed part of station attendants' work.

Training for the portion of lav service work newly assigned to the station attendants was requested by them and Air Canada assigned Jack Lussier, an acting training instructor, to train the station attendants in both the newly assigned portion of duties and the operations involving the newly designated type of lav cart.

It was against this background that the incidents giving rise to the complaints took place.

At approximately 7:00 a.m. on November 28, 1990, Mr. Lussier, with a supply of gloves, arrived at Gate 74 to commence training the complainants on the new procedures. Mr. Peretti refused the training because he thought the gloves provided by Mr. Lussier did not afford sufficient protection and he would not perform the training without additional surgical-type insert gloves. Mr. Peretti was then assigned elsewhere by Air Canada pending resolution of his request for surgical inserts.

Prior to the arrival of an aircraft, Messrs. Barker and Baker received training from Mr. Lussier on the operation of the lav cart. That training consisted of a demonstration by Mr. Lussier with no "hands on" training performed by the complainants.

At approximately 9:00 a.m., Mr. Peretti, having returned to Gate 74 and with the aircraft having arrived, the "hands on" training with respect to removal (from the aircraft) and servicing of the lav unit was again requested by Mr. Lussier. At this point rubber surgical-type glove inserts were made available.

According to Air Canada, Mr. Peretti again refused the training stating that he wanted clarification from his union. Mr. Peretti maintains that he did not refuse training a second time. Messrs. Barker and Baker did refuse further training. Air Canada claims Messrs. Barker and Baker refused to continue the training pending further clarification from their union. Messrs. Barker and Baker claim their concerns were with Mr. Lussier's training abilities and their lack of knowledge of the chemical properties of the lav detergent.

It should be noted that station attendants had attended a Workplace Hazardous Materials Information System (WHMIS) training course prior to the incident of November 28, 1990.

After the complainants' refusals, Mr. Lussier left the area, reported to his supervisor who, almost immediately, suspended the three complainants pending investigation. Labour Canada was called by Mr. Peretti. Chris Mattson (a safety officer within the meaning of the Code) conducted an investigation into the matter, later that day.

Mr. Mattson, as he later confirmed in writing following a request for "a report" by complainants' counsel, stated, in effect, that no decision with respect to "danger" within the meaning of the Code was required of him in the circumstances because Mr. Peretti's concerns with surgical gloves had been resolved by the time of his (Peretti's) second refusal and, in his opinion, the refusal of all three complainants was related to assignment of duties rather than safety concerns. Mr. Mattson also confirmed that the complainants were informed of their right to file the instant complaint with the Board.

In accordance with steps provided by the collective agreement, Air Canada subsequently issued disciplinary letters to Mr. Peretti for a 20-day suspension period and to Messrs. Barker and Baker for 10-day suspension periods. The disciplinary actions have been grieved.

It is thus squarely before the Board to decide, in the circumstances of this case, if the disciplinary actions taken by Air Canada do or do not contravene the provisions of section 147(a) of the Code.

In the course of hearing this case, the Board was presented with a substantial amount of evidence, some of which, unfortunately, was quite contradictory. It is not necessary, however, for purposes of rendering a decision, to make any lengthy analysis of the evidence or express any preference with respect to credibility. The salient facts are that the complainants did refuse the training offered and cited what they believed were, safety concerns for so doing. Thus, they feel, they should be protected by the Code from any resulting discipline.

Air Canada, on the other hand, takes the position that the refusals were not related to safety, although they took place immediately following a safety issue (Mr. Peretti's request for gloves) which had been resolved by the time of his second or continued refusal and the other complainants' first refusals.

Mr. Peretti's request for protective equipment had been met. Messrs. Barker and Baker's alleged concerns with the properties of the lav detergent could have been allayed had they availed themselves of the opportunity to "pull up" the applicable WHMIS data sheet which was readily available to them, which is in evidence before the Board and which does not "flag" any particular safety measures denied them.

In cases such as this, where the allegation is that the employer imposed prohibited disciplinary action because the complainants acted in accordance with Part II of the Code, the burden of proof lies with the employer which must satisfy the Board that its actions did not contravene section 147.

The complainants, on the other hand, must, in order to succeed in their complaints, first satisfy the Board that they have "acted in accordance with this Part" and that each, as specified by section 128(1)(b), "had reasonable cause to believe" that a condition of danger existed.

In the instant case, the tasks required consisted of performing training in the context of an operation which is an extension of an operation (lav servicing) with which the complainants were familiar. Messrs. Peretti and Barker had done lav servicing for Air Canada and were thoroughly familiar with the equipment and material

involved. Mr. Baker had previously done lav servicing for a different employer and, while the Air Canada operation may have been somewhat different, the use of detergent and handling of waste materials were not unknown to him.

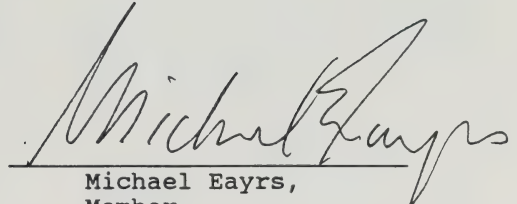
Having carefully reviewed all the evidence and circumstances of these complaints, the Board finds, on the balance of probabilities that not one of the complainants "had reasonable cause to believe" that a condition existed which constituted a danger to him. It further finds that Air Canada has satisfied it that the employer had not taken disciplinary action prohibited by section 147(a) of the Code.

Accordingly, the complaint is dismissed.

Having disposed of this complaints, I would like to offer the following two gratuitous remarks:

1. Having heard and reviewed the lengthy evidence in this matter and despite having dismissed the complaint, it does seem to me that perhaps, had there been better communication on the part of Air Canada with respect to the added lav servicing operation prior to implementation of the training in it, this whole matter might have been avoided.
2. This matter was heard during two intensive days of hearing some 18 months ago. The parties presented and argued their cases succinctly, forcefully and,

in my opinion, well. I offer my most sincere personal apology for the inordinate delay in rendering this decision.


Michael Eayrs,
Member

ISSUED at Ottawa this 1st day of April 1993

CLRB/CCRT - 1002

information

This is not an official document. Only the reasons for Decision can be used for legal purposes.

SUMMARY

Purolator Courier Ltd., applicant, and Eastern Canada Council of Teamsters, Miscellaneous Employees, Teamsters Local 987 of Alberta, Cartage and Miscellaneous Employees' Union, Local 931, Chauffeurs, Teamsters and Helpers, Local 395, Teamsters Joint Council, Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, General Teamsters, Local Union 979, Teamsters Local Union 938, Transport and Allied Workers' Union, Teamsters Local 855, and Energy and Chemical Workers Union, Local 133 and Communications, Energy and Paperworkers Union of Canada, respondents.



Board File: 530-2089
Decision no. 1003

The employer filed an application for global review of the bargaining units pursuant to section 18 of the Code. The units in question, of which some are certified and others voluntarily recognized, represent all drivers, mechanics and warehouse staff who work for Purolator in Canada.

The bargaining units are all represented by unions affiliated with the Teamsters, except for the employees in the Québec region who are represented by the Energy and Chemical Workers Union, Local 133 (ECWU).

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

RÉSUMÉ

Purolator Courrier Ltée, requérant, et Conseil des Teamsters de l'Est du Canada, section locale 987 du syndicat des Teamsters en Alberta (Miscellaneous Employees), Union des employés du transport local et industries diverses, section locale 931, section locale 395 du syndicat des Teamsters (Chauffeurs, Teamsters and Helpers), Conseil conjoint des Teamsters, section locale 91 du syndicat des Teamsters (Teamsters, Chauffeurs, Warehousemen and Helpers), section locale 979 du syndicat des Teamsters (General Teamsters), section locale 938 du syndicat des Teamsters, section locale 855 du syndicat des Teamsters (Transport and Allied Workers' Union) et Syndicat des travailleurs de l'énergie et de la chimie, section locale 133 et Syndicat canadien des communications, de l'énergie et du papier, intimés.

Dossier du Conseil: 530-2089
Décision n° 1003

L'employeur a présenté une demande de révision globale des unités de négociation en vertu de l'article 18 du Code. Ces unités, dont certaines sont accréditées et d'autres reconnues volontairement, représentent tous les chauffeurs, les mécaniciens et le personnel d'entrepôt au service de Purolator au Canada.

Ces unités de négociation sont toutes représentées par des syndicats affiliés aux Teamsters, sauf celle regroupant les employés de la région de Québec qui est représentée par le Syndicat des travailleurs de l'énergie et de la chimie, section locale 133 (STEC).

The employer claimed that a national bargaining unit is appropriate. It asked that the Canada Council of Teamsters (CCT), which at present represents 11 of the 18 certified bargaining units, become the certified bargaining agent. All unions affiliated with the Teamsters have agreed to the transfer of their bargaining rights to the CCT.

The Energy and Chemical Workers Union, Local 133 (ECWU) objected to the application on the grounds that the employer has not shown that the current bargaining structure established by the Board, i.e., units by branch or by administrative region, no longer allows collective bargaining. In that respect, the recent recognition of the bargaining units, certified for the most part in 1989 and in 1990, goes against the employer's position.

The Board determined that a single bargaining unit representing the operations employees in Canada is an appropriate unit. It based its decision on the complex and interrelated operational structure of the employer, as well as the certification and collective bargaining background. The recent certifications and ensuing negotiations do not preclude as such the review of the bargaining structure, if the effect of such a review does not hinder the preservation of the representation.

L'employeur allègue qu'une unité de négociation nationale est une unité habile à négocier. Il demande que le Conseil canadien des Teamsters (CCT), qui représente actuellement 11 des 18 unités de négociation accréditées, devienne l'agent négociateur accrédité. Tous les syndicats affiliés aux Teamsters ont consenti à ce que leurs droits de négociation soient transférés au CCT.

Le Syndicat des travailleurs de l'énergie et de la chimie, section locale 133 (STEC) s'oppose à la demande au motif que l'employeur n'a pas démontré que la structure actuelle de négociation établie par le Conseil, à savoir des unités par établissement ou région administrative, ne permet plus la négociation collective. À cet égard, la reconnaissance récente de ces unités de négociation, accréditées pour la majorité en 1989 et 1990, joue en défaveur de la position de l'employeur.

Le Conseil a décidé qu'une seule unité de négociation pour représenter les employés préposés à l'exploitation au Canada est une unité habile à négocier. La structure opérationnelle complexe et interdépendante des diverses activités de l'employeur de même que l'histoire des accréditations et de la négociation collective fondent cette décision. Les accréditations récentes et les négociations collectives qu'elles ont engendrées n'empêchent pas, en soi, que la structure des unités de négociation soit révisée, si cette révision n'a pas pour effet d'empêcher le maintien de la représentation collective.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

The two unions involved indicated they were interested in becoming the certified bargaining agent for that unit. The Board examined their respective status. The Communications, Energy and Paperworkers Union of Canada succeeded the ECWU in November 1992 following the merger of the Canadian Paperworkers Union, the Communications and Electrical Workers of Canada and the Energy and Chemical Workers Union.

For its part, the CCT meets the requirements of section 32 of the Code, which allows a council of trade unions to be certified.

The Board decided not to order a representation vote since the CCT possesses the representative character with regard to the revised bargaining unit. However, it stayed its final decision to certify the CCT until that council has provided the Board with additional information.

Les deux syndicats en présence ont manifesté leur intérêt à devenir l'agent négociateur accrédité pour cette unité. Le Conseil a examiné leur statut respectif. Le Syndicat canadien des communications, de l'énergie et du papier a succédé au STEC en novembre 1992 à la suite d'une fusion du Syndicat canadien des travailleurs du papier, du Syndicat des travailleurs et travailleuses en communications et en électricité du Canada et du Syndicat des travailleurs de l'énergie et de la chimie.

Pour sa part, le CCT remplit les conditions de l'article 32 du Code qui permet à un regroupement de syndicats d'être accrédité.

Le Conseil a décidé de ne pas ordonner la tenue d'un scrutin de représentation étant donné la représentativité actuelle du CCT pour l'unité de négociation révisée. Le Conseil a toutefois suspendu sa décision définitive d'accréditer le CCT jusqu'à que celui-ci lui ait fourni certaines informations supplémentaires.

Reasons for decision

Purolator Courier Ltd.,
applicant,
and

Eastern Canada Council of Teamsters; Miscellaneous Employees, Teamsters Local 987 of Alberta; Cartage and Miscellaneous Employees' Union, Local 931 (Teamsters Quebec); Chauffeurs, Teamsters and Helpers, Local 395; Joint Council No. 91; Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 91; General Teamsters, Local Union 979; Teamsters Local Union 938; Transport and Allied Workers' Union, Teamsters Local 855; Energy and Chemical Workers Union, Local 133; and Communications, Energy and Paperworkers Union of Canada,

respondents.

Board File: 530-2089

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Ginette Gosselin and Mr. J. Jacques Alary, Members.

Appearances

Mr. Dennis Griffin, accompanied by Mr. Ray P. Pedersen, for Purolator Courier Ltd.;

Mr. Robert Côté, for the Energy and Chemical Workers Union, Local 133; and

Mr. Robert Castiglio, accompanied by Messrs. Richard Charruau and Pierre Deschamps, for the Teamsters.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

Status of the File

A public hearing was held in Montréal on January 14 and 15, 1993, after the parties had had the opportunity to file their written submissions with the Board.

On June 1, 1992, the Board received an application for review pursuant to section 18 of the Code in which Purolator Courier Ltd. (Purolator or the employer) sought the merger of the existing 17 certification orders and 6 voluntary recognitions involving the bargaining agents (the Teamsters) affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (International Brotherhood). The employer further requested that the Canada Council of Teamsters (CCT) be certified as bargaining agent for the following bargaining unit:

"All employees of Purolator Courier Ltd. working in Canada, including owner operators in British Columbia, excluding region '518' (Eastern Quebec) but including Thetford Mines, excluding dispatchers and radio-operators, agents and brokers (owner operators), janitors, facilities and systems maintenance employees, supervisors and those above the rank of supervisor, office staff, sales staff, and casual employees."

The applicant was not seeking a review of the order certifying the Energy and Chemical Workers Union (ECWU) as bargaining agent for its employees working in the Québec region (region 518). As soon as the Board began considering the present case, the employer and the Teamsters challenged the interested party status of the ECWU. The parties presented their respective positions on this question and, on November 10, 1992, the Board granted the ECWU interested party status in the following terms:

"The Board finds that this application for review, which seeks to redefine the bargaining units to create a single national unit, requires, without any presumption as to what the final decision will be, the examination and consideration of the current situation as a whole, i.e., the existing 18 certification orders, including the one issued to the Energy and Chemical Workers Union, and the 6 voluntary recognitions. Accordingly, the Board found that the Energy and Chemical Workers Union is an interested party in these proceedings."

(translation)

Besides the ECWU, which represents employees in the Québec region, the certification orders were issued to bargaining agents affiliated with the International Brotherhood: the CCT holds 11 certification orders, the Eastern Canada Council of Teamsters (ECCT) and the Western Canada Council of Teamsters (WCCT) one each, the Cartage and Miscellaneous Employees' Union, Local 931 (Teamsters Quebec), two for units in Quebec, and Teamster Locals 395 and 987 one each. Teamster Locals 855, 395, 979, 938 and 91 are voluntarily recognized to represent groups of employees in various regions of the country. Moreover, Locals 31, 141, 213, 879, 880 and 927 are covered by the application for review to the extent that their representative character reflects, depending on the case, that of the three councils of trade unions involved here.

As of June 1, 1992, the employer was a party to four collective agreements. The agreement concluded with the ECWU expired on December 31, 1992. The bargaining agents affiliated with the International Brotherhood were parties to three collective agreements respectively signed by the CCT, the WCCT and Local 931, for the two bargaining units the latter represents in Quebec. The agreement with Local 931 and that with the CCT expired on December 31, 1992, while the agreement with the WCCT expired on September 30, 1992. The parties are now negotiating to renew these agreements.

On January 13, 1993, the Communications, Energy and Paperworkers Union of Canada (CEPUC) filed an application for certification to represent the employer's employees working on the Island of Montréal. These employees are now represented by Local 931 (file 555-3530). In November 1992, CEPUC succeeded the ECWU following the merger of the Canadian Paperworkers Union, the Communications and Electrical Workers of Canada, and the Energy and Chemical

must now be considered a party to these proceedings, in place of the ECWU. Moreover, the application for certification of January 13 is a new element that the Board must take into account in considering the present file.

II

The Positions of the Parties

1. The Employer

The employer requested that the 17 bargaining units currently represented by the Teamsters and comprising the drivers, mechanics and warehousemen be merged into a single unit for the following reasons.

Purolator operates a rapid parcel delivery service in Canada and elsewhere. It has established a complete and fully integrated network of routes in all parts of Canada to serve its clientele. Several of its customers have places of business in a number of provinces and, under the terms of its contracts, Purolator must provide delivery service throughout Canada. The company has approximately 10 000 service points.

Given this situation, the employer argued that a single national bargaining unit, excluding the employees currently represented by the ECWU (now CEPUC), is appropriate. Such a structure would meet the company's needs while providing the employees with appropriate union representation.

In the employer's opinion, the recent growth in the number of bargaining units and hence the number of potential negotiations threatens its ability to meet its business commitments, the fulfilment of which requires that there be absolutely no interruption of its activities at all its

service points. The efficient routing of parcels, from pick-up to delivery anywhere in Canada, whether by land or air, involves the implementation and application, without interruption, of complex procedures and schedules. The company's existing administrative structure, consisting of only two divisions for all of Canada, is designed to ensure a simplified and integrated management of all aspects of its operations.

At least 14 of the certification orders involved here were issued in 1989 and 1990. They cover groups of employees working at one establishment (or terminal) or in one administrative region or province (such as Alberta or British Columbia) or an area comprising several provinces (e.g. New Brunswick, Prince Edward Island and Nova Scotia). These orders were issued to Teamster locals or to one or another of the councils of trade unions involved in these proceedings.

The situation is now such that all operating employees, except for those in the Québec region, were governed by one or another of the collective agreements negotiated with the Teamsters.

This situation, argued the employer, warranted the Board's intervening at this point in order to take into account this reality and its long-standing argument that industrial peace would be just as well, if not better, served by a single bargaining unit.

Concurrently with the issuing of these certification orders, the employer and the Teamsters had begun negotiations, which led to the establishment of three bargaining tables. Negotiations produced three collective agreements: one for British Columbia, signed on March 1, 1991 by the WCCT; one for the province of Quebec, signed on November 16, 1990 by

Local 931; and one signed on January 16, 1991 by the CCT. The latter agreement (for which negotiations began in May 1990) was the subject of a memorandum of understanding of November 28, 1990. In addition to determining the contents of the collective agreement applicable to all newly certified units, this memorandum of understanding provided for voluntary recognition of uncertified bargaining units in Newfoundland, Ontario, Manitoba and Saskatchewan. It also provided for general voluntary recognition of the group of employees employed in vehicle maintenance (the mechanics). Some of these employees were already covered by certification orders, specifically those issued to Local 931 and to the ECWU in Quebec.

According to the employer, the purpose of these voluntary recognitions was to put an end to the Teamsters' organizing campaign which, in any case, would have achieved the same result. The applications for certification then before the Board were subsequently withdrawn.

Since the CCT already represented the vast majority of the employees, it would appear to be a bargaining agent appropriate to represent all the employer's employees, excluding those in region 518 (Québec) who were currently represented by the ECWU. The employer was not asking that those employees be integrated into the national unit. It wanted in this way to avoid interunion strife. It pointed out that the ideal situation would unquestionably be a single unit comprising all employees, but having said this, it concluded that a bargaining unit comprising all drivers, mechanics and warehousemen, excluding the Québec employees, would be a significant improvement on the existing situation.

2. The Teamsters

The Teamsters supported the employer's application. The three collective agreements to which they were a party provided for similar working conditions for all employees they represented. According to the Teamsters, this situation favoured recognition of a single bargaining unit comprising the employees whose working conditions were already similar.

With regard to the application that the CCT be certified to represent this national bargaining unit, the Teamsters pointed out that the employees affected all belonged to locals affiliated with the CCT. The CCT thus met the requirements of section 32 of the Code for certification as a council of trade unions in respect of the unit sought. The various locals, as well as the WCCT and the ECCT, had agreed in writing that their respective certifications or voluntary recognitions be replaced by a certification issued on behalf of the CCT.

Finally, with regard to the description of the unit proposed by the employer, the Teamsters proposed to add to it the owner operators working in Manitoba. Those employees were currently the subject of an application for certification filed by Local 979. This addition would include the owner operators in British Columbia and Manitoba, but would not include those working in the other provinces. The Teamsters took no specific position on the exclusion from this national unit of the group of employees currently represented by the ECWU in Québec.

3. The ECWU

The ECWU objected to the employer's application.

First, it questioned the appropriateness of reviewing the bargaining units. The ECWU believed that it had not been established that the existence of a multiplicity of units was so serious a source of inefficiency and problems that it was necessary to merge into a single unit all, or nearly all, employees, excluding office employees throughout Canada. It had not been established that these units were no longer appropriate. The ECWU also alleged that the Board's very recent recognition of appropriate bargaining units by establishment or administrative region worked against the employer's position. The manner in which the Board had agreed to structure the bargaining units at Purolator was based on the principle that it did not have to define the most appropriate bargaining unit and that the right of these employees to belong to a union would, for all practical purposes, have been compromised had it not agreed to recognize, beginning in 1983, units like those it had since recognized. We will have more to say about these decisions later.

Finally, argued the ECWU, the employer's position was shaky insofar as it was not seeking the integration of the employees represented by the ECWU in Québec. If, in fact, it was possible to operate the business efficiently without integrating the Québec region, then it was certainly possible in other regions. There was therefore no validity to the argument that a national unit was necessary to meet the company's needs.

Creating a national bargaining unit would have the effect, in practice, of rendering illusory, in future, the expressed wish of the majority to change union allegiance. In this regard, the ECWU felt that if the Board decided to review the bargaining units, it should recognize that the group of employees working in the province of Quebec was a viable unit and just as appropriate as a national unit, thereby

maintaining a closeness between the bargaining agent and the employees. The ECWU cited the case of the office employees in the province of Quebec who formed a single bargaining unit. The application for certification filed by CEPUC on January 13, 1993 added further weight to this proposal. The ECWU asked that the employees be consulted regarding not only the choice of a bargaining agent, but also the appropriateness of creating one or more bargaining units.

On another matter, the ECWU alleged that granting the application to merge into a single unit not only the units already certified, but also those recognized voluntarily, would do indirectly what the Code did not allow, namely, certify groups of employees in respect of whom no application for certification had been filed in accordance with the rules of the Code. In Canada Transport Group Ltd. (1989), 78 di 174; 5 CLRBR (2d) 119; and 89 CLLC 16,044 (CLRBR no. 759), the Board was clear in this regard:

"Upon reflection, and without having to decide the matter, we believe that section 18 allows the Board to affect the scope of voluntarily recognized units only in an incidental fashion while extending the scope of certified units. ..."

(pages 192; 135; and 14,431)

Finally, the ECWU disputed the claim that the CCT would be appropriate, under its constitution, for certification to represent the employees belonging to the Teamster locals affiliated with it. It asked the Board, should this argument be rejected, to hold a secret ballot to determine whether the individual employees wished to be represented by the CCT.

III

Decision

The questions to be answered in the present case are the following. Should the Board review the existing bargaining units? If so, what should be the procedure for choosing the certified bargaining agent (or agents)?

1. Should the Board review the existing bargaining units?

The Board's power to review the bargaining structure in the context of a section 18 application is well established and is not at issue in the present case.

This is not the first time that Purolator has submitted arguments to the Board supporting the recognition of larger bargaining units or, at the very least, units larger than those consisting of a single establishment or administrative region, such as the Board has determined.

In 1983, when the ECWU applied to be certified to represent the employees working on the Island of Montréal, the employer adopted this position. On this occasion, the Board reviewed the history of certification with respect to this employer. It then referred to the Board's refusal, as far back as 1976, to recognize a bargaining unit comprising employees of Metropolitan Toronto, but noted that this approach had not been followed in 1980 in British Columbia. In 1983, the Board therefore concluded that the proposed bargaining unit was appropriate, recognizing at the same time the complex and highly integrated nature of Purolator's operations. In certifying this unit, which it acknowledged not to be the most appropriate for collective bargaining, the Board said the following:

"... The Board cannot ignore the plea of the employees that they be allowed to exercise their right to collective bargaining, as guaranteed in the Code, because their unit is less than ideally appropriate. The task of organizing collective bargaining in the employee ranks of this company has become remarkably formidable over the past five years, and will likely continue to increase in difficulty as the operation enlarges."

(Purolator Courier Ltd. (1983), 53 di 166; and 83 CLLC 16,069 (CLRB no. 432), pages 177; and 14,567)

Moreover, bargaining units comparable with that sought had been recognized after 1976, and this situation had not prevented the conduct of collective bargaining. (See Purolator Courier Ltd., supra.)

A few years later, in Purolator Courier Ltd. (1989), 77 di 1 (CLRB no. 730), in disposing of an application for certification covering the employees in region 513 (Windsor and Chatham), the Board reached the same conclusion, despite the employer's opposition. It had the following to say:

"... While we are fully aware that the bargaining unit applied for is not the most appropriate unit, in the circumstances it is sufficiently identifiable and appropriate to provide the employees a realistic opportunity to exercise their rights under the Code."

(page 7)

As we have seen, most certifications covering Purolator were granted subsequent to the issuing of that decision. In short, the Teamsters, relying on that decision, intensified their organizing campaign, and the employer stopped opposing the creation of units smaller than those that it had previously favoured.

The complex and integrated operating structure put in place to ensure the pick-up, delivery and distribution of parcels of Purolator's customers, the similar composition of the bargaining units, and what is known thus far of the history

of certification and collective bargaining are all factors that have satisfied the Board that the bargaining units should be reviewed. The Board decided that a single bargaining unit comprising all operating employees, including those in region 518 (Québec), is appropriate for collective bargaining.

The recent nature of certification and collective bargaining does not itself preclude the possibility of reviewing the bargaining units. Past Board decisions reveal, as a rule, that the Board reviews bargaining units in situations where parties seek to alter a long-standing relationship or where this relationship is generally the source of difficulties or conflicts that are incompatible with the maintenance of industrial peace. (See Canadian Broadcasting Corporation (1991), 84 di 2 (CLRB no. 846); and Quebec North Shore & Labrador Railway Co. (1992), 93 CLLC 16,020 (CLRB no. 978).) Those past decisions do not, however, preclude our taking into account other factors in disposing of an application for review, as is the nature of these proceedings.

Now the employer is again pressing the issue, arguing that this multiplicity of bargaining units, approved by the Board at one time for clearly valid reasons, does more to impede the establishment of orderly collective bargaining than to facilitate it. In this regard, its having to conduct several sets of negotiations with unions all affiliated with the Teamsters, which represent the vast majority of the employees involved, seems to be a really unnecessary exercise, given the similarity of the working conditions negotiated. It must also negotiate with the ECWU in respect of a group of employees who perform the same duties as are performed by the employees represented by the Teamsters.

The Board has for a number of years known and recognized the operating structure peculiar to Purolator (see in particular

Purolator Courier Ltd. (432), supra), but has nevertheless chosen to fashion bargaining units of a size that facilitated at the time access to unionization. Having achieved this objective, can it now envision a situation that could warrant its re-examining the structure of the bargaining units, based on the employer's original arguments?

Without establishing a hard and fast rule, the Board believes that a review of the bargaining structure in these circumstances may be appropriate. The purpose of this review, i.e., to facilitate and integrate into the company's operations the collective bargaining process, must not, however, be achieved at the expense of the rule on which the Board based its earlier decisions, namely, to promote access to unionization. Such is not the case here, because restructuring the bargaining units does not prejudice unionization and the benefits the employees have derived from it.

In this regard, CEPUC's application for certification of January 13 has no particular impact. This application affects the same bargaining unit as the ECWU was certified to represent in 1980, but which the employees decided to abandon in 1987 in order to join Local 931. The employees are now seeking, before the Board, to return to their original bargaining agent, or rather its successor, CEPUC. This situation does not in itself affect the determination of the bargaining unit, but relates to the identity of the bargaining agent. The existence of a single unit necessarily implies that a single bargaining agent will remain and that, for some employees, the identity of the bargaining agent will change. In this sense, the decision to review the bargaining units affects the application for certification of January 13. This is a consequence of a monopoly of union representation, but it does not mean that

this application can be considered an impediment to the review of the bargaining units.

The ECWU's argument that the Board should not merge, in the context of this application, certified and voluntarily recognized bargaining units unless it does so in a manner incidental to the extending of the scope of certified units does not apply here. The principle set out by the Board in Canada Transport Group, supra, does not preclude the Board's exercising in the present case its power of review, bearing in mind that the voluntary recognitions involved were extended to unions also affiliated with the Teamsters.

There remains the question of the owner operators. At the present time, the status of these individuals varies from one region or province to another. The Board decided that there is no reason, at this stage of these proceedings, to include the owner operators in the redefined bargaining unit. It has already determined that the operating employees in the Québec region who are now represented by the ECWU should be included in the bargaining unit, given the similarity of their duties and the resulting community of interest. It was not established that this reasoning applies to the owner operators in British Columbia and Manitoba. Just as the Board refused to define a tailor-made bargaining unit for the operating employees in Québec, it likewise refuses to do so for the owner operators in certain provinces.

Moreover, the Board includes the mechanics in the redefined bargaining unit.

2. The Procedure for Choosing the Bargaining Agent

Past Board decisions have already defined certain steps to be followed in choosing a bargaining agent where there is a review of bargaining units pursuant to a section 18 application.

First, the Board generally considers that the bargaining agents already certified to represent one or another of the groups of employees concerned may, a priori, be certified to represent one or more of the redefined bargaining units, if they so desire. Second, if more than one bargaining agent expresses such an interest, the Board determines, based on criteria about which we will have more to say later, whether it will hold one or more representation votes.

In the present case, two bargaining agents have expressed their wish to become the certified bargaining agent. CEPUC is a union that is applying for the first time to be certified as bargaining agent. The Board must ensure that this union has established its status as trade union within the meaning of section 3 of the Code:

"'trade union' means any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees."

CEPUC claims to be the successor union to the ECWU and seeks to replace it in the instant case. The Board must therefore ensure that the requirements of section 43 are met:

"43.(1) Where, by reason of a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, a trade union succeeds another trade union that, at the time of the merger, amalgamation or transfer of jurisdiction, is a bargaining agent, the successor shall be deemed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise."

(2) Where, on a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, any question arises concerning the rights, privileges and duties of a trade union under this Part or under a collective agreement in respect of a bargaining unit or an employee therein, the Board, on application to it by a trade union affected by the merger, amalgamation or transfer of jurisdiction, shall determine what rights, privileges and duties have been acquired or are retained.

(3) Before determining, pursuant to subsection (2), what rights, privileges and duties of a trade union have been acquired or are retained, the Board may make such inquiry or direct that such representation votes be taken as it considers necessary."

CEPUC filed a copy of its constitution and of the merger agreement concluded with the other unions involved. These documents establish that CEPUC meets all requirements set out in past Board decisions for recognition as an organization of employees having the status of a trade union within the meaning of the Code. These documents also show that CEPUC meets the requirements of section 43 and has therefore acquired the rights, privileges and duties of the ECWU. The Board adds CEPUC as party to these proceedings, in place of the ECWU, and finds that it may, as a certified bargaining agent, obtain the certification in respect of the bargaining unit already defined.

The CCT, for its part, is a council of trade unions that holds 11 certifications for various groups of Purolator employees affected by these proceedings.

The certification of a council of trade unions is possible under section 32, which reads as follows:

"32.(1) Where two or more trade unions have formed a council of trade unions, the council so formed may apply to the Board for certification as the bargaining agent for a unit in the same manner as a trade union.

(2) The Board may certify a council of trade unions as the bargaining agent for a bargaining unit where the Board is satisfied that the

requirements for certification prescribed by or pursuant to this Part have been met.

(3) Membership in any trade union that forms part of a council of trade unions is deemed to be membership in the council of trade unions.

(4) Where a council of trade unions is certified by the Board as the bargaining agent for a bargaining unit,

(a) the council of trade unions and each trade union forming the council of trade unions is bound by any collective agreement entered into by the council of trade unions and the employer concerned; and

(b) this Part applies, except as otherwise provided, as if the council of trade unions were a trade union."

In Canadian Pacific Express and Transport (1988), 73 di 183 (CLRB no. 682), which by the way involved the CCT, the Board, which was called upon for the first time to determine the conditions that a council of trade unions must meet in order to satisfy the requirements of section 32, said the following:

"... For the purposes of this application, where the status of the Council is not in dispute, we are prepared to accept that a council of trade unions must at least meet the same minimum requirements that a trade union has to meet, i.e., file documents showing that it has been formalized to the extent that it is regulated by some form of constitution. The very wording of section 130(1) [now section 32(1)] requires that a council of trade unions be made up of two or more trade unions. The Board must surely then satisfy itself that all of the trade unions that are part of a council of trade unions which is making application under section 130(1) are, in their own right, trade unions within the meaning of the Code. It makes sense that organizations which could not obtain trade union status on their own should not be permitted to obtain bargaining rights indirectly by becoming a part of a council of trade unions. The Board must also satisfy itself that each and every trade union that is a member of a council of trade unions has authorized the council to act on its behalf as a bargaining agent under Part V [now Part I] of the Code."

(page 186)

The Board went on to say the following concerning the CCT's status for the purposes of the certification sought in this case:

"In this case, the Council has met these requirements. It has filed its constitution as well as the written authorization of each of the Teamster Local Unions which are members of the Council giving it the authority to act as a bargaining agent on their behalf. Further, each and every one of these Teamster Local Unions which form the Council has, at one time or another, been granted trade union status under the Code in its own right. We are therefore satisfied that the Council is a council of trade unions for the purposes of section 130(1) [now section 32(1)] of the Code. In that regard, the application is properly before us."

(page 186)

For administrative purposes, the Board does not require trade unions that appear before it frequently to establish each time, formally, their trade union status by filing their founding documents. It must, however, be satisfied, in each case, that the trade union has not lost this status, i.e., that it is still governed by a valid constitution and by-laws that meet the minimum requirements. This approach simplifies the process of considering an application for certification.

As a rule, this approach can be applied to councils of trade unions.

However, by reason of its particular traits, a council of trade unions must establish, whenever it applies to be certified for a bargaining unit, that it has the necessary authority under its constitution to represent the employees covered by the application for certification and that its member unions, whose membership in the council will serve to establish its representative character, also have the necessary authority. Granting the status of council of trade unions, for the purposes of section 32, requires that

the above requirements be met every time an application for certification is filed, since the identity of the member unions of the council, whose memberships are considered, can vary from one application to the next. Moreover, even though the Board may, for administrative purposes, waive the requirement that a council of trade unions produce its founding documents whenever it appears, it does, however, require a number of member unions to show that they enjoy the support of the employees involved. This is the case here. The CCT is a council of trade unions within the meaning of section 32 and is also a bargaining agent certified in respect of Purolator. In this sense, it can, like CEPUC, seek to be certified for the bargaining unit defined.

There remains the question of how the certified bargaining agent is to be chosen. The Board has two options: hold a representation vote to enable the employees to choose between the CCT and CEPUC, or grant certification to one of the unions without holding a secret ballot.

In Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRB no. 383), and recently in Canada Post Corporation (1993), as yet unreported CLRB decision no. 993, the Board concluded that when bargaining units are redefined, in the context of an application for review, a representation vote was not necessary where it was established that the employees added or moved were in the minority. In Canada Post Corporation, supra, the Board concluded as follows:

"Providing the Board is convinced that a unit respects the corporate structure and the employees' community of interests, that it is viable, that it guarantees industrial peace, the Board must declare itself satisfied. ..."

An examination of the representative character of the competing unions reveals that the CCT already represents the vast majority of the employees in the bargaining unit defined. Such is not the case with CEPUC. To order a representation vote in these circumstances would not serve the purposes sought here. For these reasons, the Board finds that the CCT possesses the representative character required to be certified for the following bargaining unit:

"all employees of Purolator Courier Ltd. working in Canada, excluding dispatchers and radio operators, agents and brokers (owner operators), janitors, facilities and systems maintenance employees, supervisors and those above the rank of supervisor, office staff, sales staff and casual employees."

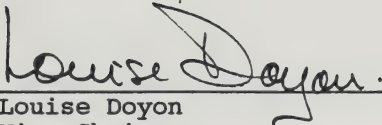
The Board will not make its decision to certify the CCT final until completion of the investigation concerning membership and the agreement of certain Teamster locals to transfer their representation rights to the CCT. Moreover, the CCT must also satisfy the Board that one or more of its locals has the necessary authority, under its constitution, to represent the employees in the Québec region.


Given the Board's decision concerning the owner operators, the parties shall file their submissions on how the Board should dispose of this question.

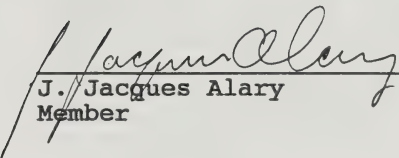
This is an interim decision pursuant to section 20(1) of the Code.

The Board appoints Ms. Suzanne Pichette, director of its Montréal regional office, or any other officer she may

designate, to conduct the additional investigation and to report to the Board.


Louise Doyon
Vice-Chair


Ginette Gosselin
Member


J. Jacques Alary
Member

ISSUED at Ottawa, this 6th day of April 1993.

CCRT/CLRB - 1003

information



This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

SUMMARY

CANADIAN COUNCIL OF BROADCAST UNIONS AND CANADIAN UNION OF PUBLIC EMPLOYEES, APPLICANTS, AND CANADIAN WIRE SERVICE GUILD, LOCAL 213 OF THE NEWSPAPER GUILD, NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, AND ASSOCIATION OF TELEVISION PRODUCERS AND DIRECTORS (TORONTO), CERTIFIED BARGAINING AGENTS, AND CANADIAN TELEVISION PRODUCERS' AND DIRECTORS' ASSOCIATION, NATIONAL RADIO PRODUCERS' ASSOCIATION, AND ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS, BARGAINING AGENTS, AND CANADIAN BROADCASTING CORPORATION, EMPLOYER, AND CBC MANAGERS' ASSOCIATION AND CLAUDE LATRÉMOUILLE, INTERVENORS.

Board File: 530-1827

Decision No.: 1004

Interim decision. Section 20(1) of the Canada Labour Code (Part I - Industrial Relations). Dismissing two motions filed in the course of the global review proceedings of the CBC English network bargaining structure (see Canadian Broadcasting Corporation (1991), 84 di 2 (CLRB no. 846)). Motion to stay pending judicial review. Dismissed. Motion to reconsider guidelines on whether a vote is necessary in every unit following a global review. Dismissed.

RÉSUMÉ

CANADIAN COUNCIL OF BROADCAST UNIONS ET SYNDICAT CANADIEN DE LA FONCTION PUBLIQUE, REQUÉRANTS, ET GUILDE DES SERVICES DE PRESSE DU CANADA, SECTION LOCALE 213 DE LA GUILDE DES JOURNALISTES, SYNDICAT NATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES EN COMMUNICATION, ET ASSOCIATION DES RÉALISATEURS ET DIRECTEURS DE TÉLÉVISION (TORONTO), AGENTS NÉGOCIATEURS ACCRÉDITÉS, ET ASSOCIATION DES RÉALISATEURS ET DIRECTEURS DE TÉLÉVISION CANADIENNE, ASSOCIATION NATIONALE DES RÉALISATEURS DE LA RADIO, ET ALLIANCE DES ARTISTES CANADIENS DU CINÉMA, DE LA TÉLÉVISION ET DE LA RADIO, AGENTS NÉGOCIATEURS, ET SOCIÉTÉ RADIO-CANADA, EMPLOYEUR, ET ASSOCIATION DES CADRES DE RADIO-CANADA ET CLAUDE LATRÉMOUILLE, INTERVENANTS.

Dossier du Conseil: 530-1827

Décision n^o: 1004

Décision partielle. Paragraphe 20(1) du Code canadien du travail (Partie I - Relations du travail). Rejet de deux demandes présentées dans le cadre de la révision globale des unités de négociation du réseau anglais de Radio-Canada (voir Société Radio-Canada (1991), 84 di 2 (CCRT n^o 846)). Demande de suspension des procédures, en vue de la révision judiciaire. Rejetée. Demande visant à réexaminer les directives sur la nécessité de tenir un scrutin dans toutes les unités visées par une révision globale. Rejetée.

Motion by the Canadian Council of Broadcast Unions to stay proceedings pending the outcome of a judicial review application filed with the Federal Court of Appeal. Motion dismissed essentially on practical considerations relating to the need for the Board to determine a number of issues prior to actually deciding the matter of union support.

Motion by CUPE to have the Board reconsider the guidelines it had established (Canadian Broadcasting Corporation, September 16, 1992 (LD 1061)) with regard to its discretion to hold or not to hold votes in the three newly consolidated bargaining units of the English network.

CUPE stated that since members belonging to different unions and units are now being consolidated into a new unit, a vote is compulsory even where a union is able to establish majority support. The Union relied on Télélobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRBR no. 198), and argued that the so-called "double majority rule" required that a vote be held.

The Board dismissed the motion. It made the distinction between the extension of a unit in order to cover a non unionized group and the merger of already organized units. A global review involves the consolidation of groups already organized. The "double majority rule" would render any consolidation all but impossible.

Demande du Canadian Council of Broadcast Unions visant à interrompre les procédures du Conseil jusqu'à ce que la Cour d'appel fédérale ait statué sur la demande de révision judiciaire présentée à la Cour. Demande rejetée pour l'essentiel en raison de considérations d'ordre pratique et touchant le besoin de régler certaines questions préalablement à celle de la volonté de la majorité des employés.

Le SCFP désirait que le Conseil modifie les règles qu'il avaient établies dans (Société Radio-Canada, 16 septembre 1992 (LD 1061)) sur sa discrétion de tenir ou non un scrutin dans les trois nouvelles unités du réseau anglais.

Selon le SCFP, vu que des employés provenant de différents syndicats et de différentes unités sont maintenant regroupés dans une même unité, un scrutin est obligatoire même si un agent négociateur dispose de l'appui de la majorité. Le syndicat s'appuie sur Télélobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; et 80 CLLC 16,025 (rapport partiel) (CCRT n° 198), et invoque la soi-disant règle de la double majorité pour exiger la tenue d'un scrutin.

Le Conseil a rejeté la demande. Il fait une distinction entre le cas d'un syndicat qui étend son unité à des employés non syndiqués et le regroupement d'unités déjà syndiquées. Une révision globale concerne des employés déjà syndiqués. Appliquer à pareils cas la règle dite de la double majorité rendrait toute consolidation virtuellement impossible.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnements et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRBR REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Canadian Council of Broadcast
Unions,

and

Canadian Union of Public Employees,

applicants,

and

Canadian Wire Service Guild, Local
213 of the Newspaper Guild,

National Association of Broadcast
Employees and Technicians, and

Association of Television Producers
and Directors (Toronto),

certified bargaining agents,

and

Canadian Television Producers'
and Directors' Association,

National Radio Producers'
Association, and

Alliance of Canadian Cinema,
Television and Radio Artists,

bargaining agents,

and

Canadian Broadcasting Corporation,

employer,

and

CBC Managers' Association and
Mr. Claude Latrémouille,

intervenors.

Board File: 530-1827

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. J. Jacques Alary and François Bastien,
Members.

Appearances:

Ms. Suzanne Thibaudeau, Q.C., and Mr. Guy Dufort, assisted
by Mr. Claude Labrecque, Assistant Director, Industrial
Relations, for the applicant;

Mr. Paul J. Falzone, assisted by Ms. Christine Jacobs, National Executive Director, for the Alliance of Canadian Cinema, Television and Radio Artists;

Mr. Aubrey E. Golden, Q.C., assisted by Mr. Dan Oldfield, Assistant Business Manager, for the Canadian Wire Service Guild, Local 213 of the Newspaper Guild;

Mr. Gaston Nadeau, assisted by Mr. Gordon Johnson, Broadcast Division Director, for the Canadian Union of Public Employees;

Mr. Ronald Pink, assisted by Mr. Gordon Hunter, National President, for the National Association of Broadcast Employees and Technicians;

Mr. Howard Goldblatt, for the Association of Television Producers and Directors (Toronto) and the Canadian Television Producers' and Directors' Association;

Mr. David W.T. Matheson, assisted by Ms. Dale Heckman, Executive Director, for the National Radio Producers' Association;

Mr. Claude Beausoleil, assisted by Mr. Jean-Jacques Bérard, Advisor, for the CBC Managers' Association (ACMA);

and

Mr. Claude Latrémouille, on his own behalf.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

This is an interim decision issued in the context of the ongoing proceedings of the Board relating to the overall review of the English network bargaining units of the Canadian Broadcasting Corporation (CBC) (see Canadian Broadcasting Corporation (1991), 84 di 2 (CLRB no. 846)). It disposes of two motions filed in the course of these

proceedings which were dismissed earlier in a letter decision (Canadian Broadcasting Corporation, February 18, 1993 (LD 1115)). The Board decided to reissue the decision in a reasons for decision format.

Made pursuant to section 20 of the Canada Labour Code (Part I - Industrial Relations), the first motion was filed by the Canadian Council of Broadcast Unions (CCBU), which requested that the Board stay its proceedings pending the outcome of judicial review proceedings before the Federal Court of Appeal (Court file no. A-931-92).

The second motion was made by the Canadian Union of Public Employees (CUPE) pursuant to section 18 of the Code. It asks that the Board reconsider the principles set down for deciding the need to hold a vote in order to determine union support in each of the three newly defined bargaining units of the English network. The thrust of CUPE's motion is that a vote should be held with respect to a new unit even when a given union has majority support within that unit.

A hearing was held into these matters on November 10, 1992.

II

CCBU'S MOTION TO STAY

The CCBU is a council comprised of four unions that currently hold bargaining rights within the English network's old bargaining structure. Those unions are: the Canadian Wire Service Guild (CWSG), the Association of Television Producers and Directors (Toronto) (ATPD), the Canadian Television Producers' and Directors' Association

(CTPDA) and the National Association of Broadcast Employees and Technicians (NABET). An application by the CCBU to be certified for two of the three new bargaining units in the English network was dismissed in the fall of 1992.

Originally, the CCBU was established with the purpose of grouping the membership of its four founding unions within CBC's newly defined bargaining structure. As already mentioned, its application for certification was dismissed (see Canadian Broadcasting Corporation (1992), 92 CLLC 16,036 (CLRB no. 926); and Canadian Broadcasting Corporation (1992), as yet unreported CLRB decision no. 954). At that point, the CCBU filed an application for judicial review with the Federal Court of Appeal pursuant to section 28 of the Federal Court Act; that application is still pending. At the same time, the CCBU applied to the Board pursuant to section 18 of the Code for a reconsideration of its decision to dismiss the CCBU's application for certification.

At first, the CCBU left its Federal Court application dormant while the Board proceeded with its application for reconsideration. On September 25, 1992, a reconsideration panel of the Board comprised of Ms. Louise Doyon, and Messrs. J. Philippe Morneault and Richard I. Hornung, Q.C., Vice-Chairs, dismissed the application for reconsideration (Canadian Broadcasting Corporation et al. (1992), as yet unreported CLRB decision no. 959).

In the following days, the CCBU notified the Board of its intention to reactivate its proceedings before the Federal Court of Appeal. However, no motion to stay was made before the Court. Instead the CCBU asked the Board itself

to stay its proceedings pending the outcome of the Federal Court proceedings.

During the Board's hearing into this motion, all unions who belong to the CCBU supported, as expected, its motion, as did CUPE. The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) as well as the National Radio Producers' Association (NRPA) contested the motion, as did the CBC.

The thrust of the CCBU's argument is that the balance of convenience favours a stay in the particular circumstances of this exceptional kind of proceeding.

Counsel for the CCBU argues that if the Board proceeded with these proceedings while they are being challenged in the Federal Court of Appeal, a vote would likely be held during that period. In such a case, the CCBU would not appear on the ballot, a fact detrimental to the CCBU and its constituent unions. Its members would thus be deprived of the right to run as a group as opposed to each in their separate capacity. It is further argued that delaying a vote would not prejudice anyone since all the unions involved already hold well-established bargaining rights and have collective agreements. A final argument relates to cost. If the Board goes ahead and holds a nation-wide vote with respect to unit no. 1, it will be a very expensive operation. If the Federal Court of Appeal later allows the CCBU's section 28 application, it may turn out to have been a wasteful as well as confusing exercise.

Those opposing a stay basically argue that it would be pointless and impractical for the Board to stay its

proceedings at this juncture. ACTRA argues in favour of a practical approach. For ACTRA, as well as the CBC, the CCBU's motion is in fact premature and the Board should continue its preparations to hold a vote which is still some way down the road.

III

DECISION ON THE MOTION TO STAY

The decisive factor in our decision to dismiss this motion is one of practicality. The Board may be fairly close to determining which union will represent each unit but before it can do so it must first establish the actual composition of each one. At least another month or so after these reasons are issued will be needed. The Board will then need time to determine the current union support in each unit. If there is no satisfactory evidence of majority support for a given union, only then will the Board decide how majority support can be established.

The CCBU has recognized in argument that its motion affects mainly unit no. 1, even though its application for certification covered both units no. 1 and 2. The reason for that is simply that the CCBU's major constituent union in unit no. 2, i.e. NABET, is indeed likely to have a majority position in that unit. Therefore, should the Board decide to proceed with determining union support within units no. 2 and 3, the bargaining rights with respect to unit no. 2 would likely go to NABET; that union could then transfer those rights to the CCBU if the Federal Court of Appeal should grant its application.

In essence, the question is whether the Board should, on its own motion, stay its current proceedings with regard

to unit no. 1 since all agree that it should proceed in the case of units no. 2 and 3.

All those involved are well aware of the fact that the Board has not yet ordered a vote. As was pointed out by counsel for ACTRA and for CBC, the Board is still in the process of finalizing the lists of the employees whose positions are included in the newly defined units. The eligibility date has already been changed once, a fact that has caused further delays; in addition, many issues remain to be decided before union support is actually determined.

Furthermore, counsel for the CCBU mentioned in his arguments that a request for an expedited hearing had been submitted to the Federal Court of Appeal, and that he was hopeful the matter could be heard and decided within a few months. (As it turned out, the matter was heard in March 1993, and the CCBU's application for judicial review was dismissed (Canadian Council of Broadcast Unions et al. v. The Canada Labour Relations Board et al., no. A-931-92, March 1, 1993 (F.C.A.)).)

Looking at the balance of convenience, the Board's perspective is that there are indeed more reasons favouring the argument to proceed than there are against it. Here are some of them.

From a more technical angle and looking at long-term considerations, were the Board to stay its proceedings in matters of certification or revocation of bargaining rights on the ground that a Federal Court of Appeal ruling might eventually invalidate them, it is likely that virtually all such Board proceedings could be stayed at

the loser's request whenever a raid takes place. Had Parliament wanted such an outcome, it would surely have said so. There is more.

It is important not to lose sight of the fact that these global review proceedings are essentially of the nature of certification procedures. Their magnitude may be exceptional but their very nature is not. In fact, the CCBU is asking the Board to suspend the free exercise of well-established bargaining rights for seven or eight unions, so that its precarious rights can be considered. On balance, we find it proper to rule in favour of those rights clearly in existence.

For all these reasons the CCBU's motion was dismissed.

IV

CUPE'S MOTION

ON THE VOTING PROCEDURE

The thrust of CUPE's position has to do with guidelines set out in Canadian Broadcasting Corporation, September 16, 1992 (LD 1061). These form the basis on which the Board is to decide whether to hold a vote with respect to any of the newly defined bargaining units. CUPE's position relies heavily on the double majority rule set out by the Board in Telelobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198).

CUPE's argument rests in fact on the proposition that according to this rule, whenever a group of non-unionized employees excluded from the intended scope of a certification is being sought for addition in a unit

already certified, the incumbent union must show majority support within the group sought before it is added by the Board in the original unit. If that rule were applied here it would mean that at least two votes would have to be held with respect to any unit regardless of whether an overall majority support for a given unit exists. What in fact CUPE seeks to achieve is the holding of a vote with respect to unit no. 2 even though NABET is likely to show majority support by a simple show of cards.

The CWSG and NABET challenged CUPE's position on the basis that the rule applicable to the instant case is not the one set out in Teleqlobe Canada, supra. They argue that the case under consideration does not deal with the addition of new groups in an existing unit but rather with the radical overhauling of a bargaining structure. Such cases, they argue, are governed by the standard rules of certification. In their view, the bargaining units considered here are whole, new ones, distinct in essence from any existing one. It was suggested that CUPE's actual objective is to raid NABET without having to go through the hassle of an organization drive.

V

DECISION ON CUPE'S MOTION

As the Board stated at the outset in Canadian Broadcasting Corporation (846), supra, such a global review should be considered as an application for certification. As such, it goes far beyond what was considered in Teleqlobe Canada, supra. There, the double majority rule referred to by CUPE is based on the notion that an existing bargaining unit can be extended outside of the open period to include previously non-organized employees. However,

in such situations, the Board, in determining union support, will not be satisfied with a simple overall majority within the extended unit. The incumbent will also need to show majority support in both the original group and the new group to be added. If the Board did not require such a double majority, the applicant might circumvent the Code's support provisions as well as open-period requirements, and proceed to represent a non-unionized group without anyone in the group even knowing it.

In the instant proceedings, the Board has set out to review the whole unionized bargaining structure within the English network. It deals with certified units along with voluntarily recognized ones. The bottom line of the finding of the Board in Canadian Broadcasting Corporation (846), supra, is that the whole existing bargaining structure is no longer appropriate, and that the Board has undertaken to define a new one. Such an exercise simply cannot be equated to a situation where non-unionized groups are included in an otherwise appropriate unit.

The Board is not extending NABET's existing bargaining rights in unit no. 2 any more than it is extending CUPE's in unit no. 3. It has defined new units which necessarily comprise a large number of positions currently represented by NABET or CUPE. This fact does not mean that the object of the Board's decision is to extend existing certifications to non-unionized groups as would be the case under the double majority rule. NABET's or CUPE's certification certificates have been found to be no longer appropriate and as such they will be revoked in due course. This is not the kind of situation envisaged in Teleglobe Canada, supra.

The new units have been defined under the rules governing appropriateness in certification proceedings. The rules that govern union support in such cases are set forth specifically in sections 24, 28 and 29 of the Code as well as in sections 23 and 24 of the Board Regulations. They also apply in a case such as this one.

The Board said the following in letter decision no. 1061, supra:

"Union Support

A vote will be held only in those cases where no union shows a majority. The Board reserves the right nonetheless to order a vote if such majority status is not established to its satisfaction, particularly on the basis of its investigation of membership strength vis-à-vis the employee lists currently being prepared.

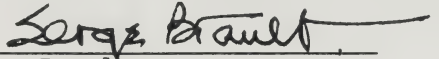
After a report is filed on union support with respect to each union seeking representation rights in any of the three bargaining units, the Board will advise for which unit, if any, a vote will be held."

Contrary to CUPE's contention, the Board has not ruled out in letter decision no. 1061, supra, that it might order a vote in any event. The Board will hold a vote only if it is not satisfied with the evidence of majority support in favour of a given union with respect to any of the three bargaining units. That, we find, is precisely the rule set out in section 28.

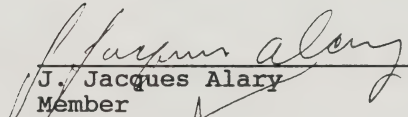
Let us consider the approach suggested by CUPE whereby a vote should be held. For the sake of argument, let us consider a raid situation as opposed to an overall review, where a union signs up 15 or 25% of the members of a unit and NABET or CUPE already represents 70% of the employees. Would the Board order a vote before dismissing the

application for certification of the raiding union? Of course not, it would dismiss it outright. Where a union seeks to displace another one as bargaining agent it cannot hope to get a representation vote without proof of majority support within the unit. Not only would the Board not order a vote failing such prima facie support, but the very possibility of ordering a vote might be questioned in light of sections 28 and 29 of the Code. A representation vote cannot be a substitute for the requirement imposed under these two sections that the union first establish a given percentage of employee membership. Although the required percentage is different under these two sections, the Board must in both cases be satisfied with the membership evidence before either granting the certification outright (pursuant to section 28) or ordering a representation vote (pursuant to section 29(2)). Even though the Board may order a vote in some circumstances, a vote cannot be used to circumvent section 28 or 29(2) with regard to the proof of union support. To trigger a vote as part of the certification process, for instance such as in the case of section 29(2), there must first be a show of valid cards or valid membership applications (see Hudson Bay Mining and Smelting Co., Limited (1993), as yet unreported CLRB decision no. 999; and Radio CHNC Limitée, New Carlisle, Quebec (1985), 63 di 26; 12 CLRBR (NS) 112; and 86 CLLC 16,009 (CLRB no. 537), upheld by Salariés de New Carlisle, Local 610 v. Syndicat des employés de CHNC New Carlisle (CNTU) et al. (1986), 79 N.R. 81; and 87 CLLC 14,048 (F.C.A.)). There is no other way in our respectful view to construe the requirements of the certification provisions.

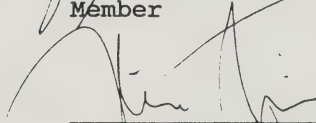
Contrary to a straightforward raid situation where the bargaining unit remains unchanged, the case here involves employees presently belonging to different units and being grouped in newly defined ones. However, if they do not support the union that represents the majority of employees included in their new unit, they can seek revocation of that union's bargaining rights or organize another union. Having said this, the matter of whether the support established by membership numbers in the instant case will actually be deemed satisfactory is one that remains for the Board to determine, particularly in light of all relevant labour relations considerations.



Serge Brault
Vice-Chairman



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 13th day of April 1993.

information

This is not an official document.
Only the Reasons for Decision can be
used for legal purposes.

Ce document n'est pas officiel.
Seuls les Motifs de décision peuvent
être utilisés à des fins juridiques.

Summary

INDEPENDENT CANADIAN TRANSIT UNION,
APPLICANT, BRINK'S CANADA LIMITED,
EMPLOYER, AND IWA-CANADA, CLC, LOCAL
UNION I-217, CERTIFIED BARGAINING
AGENT.

Board Files: 555-3527
745-4415

Decision No.: 1005

Résumé de Décision

SYNDICAT CANADIEN INDÉPENDANT DU
TRANSPORT, REQUÉRANT, BRINK'S CANADA
LIMITED, EMPLOYEUR, ET IWA-CANADA,
CTC, SECTION LOCALE I-217, AGENT
NÉGOCIATEUR ACCRÉDITÉ.

Dossier du Conseil: 555-3527
745-4415

Décision n°: 1005

The applicant union (ICTU) applies
for certification of a unit of
employees for which the intervenor
(IWA) had previously been certified
as the bargaining agent.

In its response, IWA argues that the
application is untimely in that it is
not brought within the time
limitations contained in section
24(2)(c) of the Code. The evidence
shows that notwithstanding the
Board's certification of a single
unit for all the employees, the
intervenor and the employer
negotiated two collective agreements
for the affected employees, each
having separate expiration dates.

The Board concludes that there was no
collective agreement "applicable to
the unit" in force at the time and,
accordingly, the timeliness
protections provided by section
24(2)(c) are unavailable to the
intervenor.

In the circumstances, the Board
exercises its discretion, pursuant to
section 24(2)(b), and allows the
present application to proceed at an
early date.

Le syndicat requérant (ICTU) présente
une demande d'accréditation visant
une unité d'employés à l'égard de
laquelle l'intervenante (IWA) avait
auparavant été accréditée à titre
d'agent négociateur.

Dans sa réponse, IWA prétend que la
demande est irrecevable parce qu'elle
n'a pas été présentée dans les délais
prévus à l'alinéa 24(2)c) du Code.
Les éléments de preuve présentés
montrent qu'en dépit de
l'accréditation accordée par le
Conseil à l'égard d'une seule unité
comprenant tous les employés,
l'intervenante et l'employeur ont
négocié deux conventions collectives
visant les employés touchés, chacune
ayant une date d'expiration
distincte.

Le Conseil conclut qu'il n'existait
aucune convention collective
«régissant l'unité» en vigueur à
l'époque et que l'intervenante ne
peut faire appel aux dispositions
relatives au délai prévues par
l'alinéa 24(2)c).

Dans les circonstances, le Conseil
juge qu'il convient d'exercer le
pouvoir discrétionnaire que lui
accorde l'alinéa 24(2)b) et de faire
en sorte que la présente demande soit
traitée dans un avenir rapproché.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

**CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.**

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Reasons for decision

Independent Canadian Transit
Union,

applicant,

Brinks Canada Limited,

employer.

and

IWA-Canada, CLC, Local Union
Number 1-217,

certified bargaining agent.

Board Files: 555-3527
745-4415

The Board was composed of Mr. Richard I. Hornung,
Q.C., Vice-Chairman, and Mr. Calvin B. Davis and Ms.
Mary Rozenberg, Members.

Appearances (on record):

Mr. James Baugh for the applicant;

Mr. Michael W. Hunter for the employer; and

Ms. Shona A. Moore for the certified bargaining agent.

REASONS:

Vice-Chair Richard I. Hornung, Q.C.

I

On March 30, 1992, the Board certified the intervenor,
IWA-Canada, CLC, Local Union Number 1-217 (IWA) to
represent:

*"all employees of Brinks Canada Limited
employed in British Columbia, excluding
office and sales staff and those above"*

The applicant, the Independent Canadian Transit Union, (ICTU) applies for certification, and claims majority support, for the identical unit of employees.

The intervenor, in its reply, argues that the application is untimely pursuant to section 24(2)(c) of the Code and, at the same time, files a complaint alleging a violation, by ICTU, of section 96 of the Code.

II

The applicable sections of the Code provide as follows:

"24. (2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;

(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;

(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and

(d) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only

(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and

(ii) after the commencement of the last three months of its operation.

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

III

The employees affected by this application, while covered by a single certification order, are subject to two separate collective agreements. Each has a different expiry date. The Vancouver/Victoria employees are covered by an agreement that expires on January 31st, 1993; the Kelowna/Kamloops employees, on the other hand, operate under a collective agreement that does not expire until November 8, 1994. The present application was brought on January 11, 1993. Accordingly, while the employees in Vancouver/Victoria fall within the "open period" envisaged by section 24(2)(c), the employees in Kelowna/Kamloops do not.

IWA proposes two courses of action. Initially, it urges the Board, pursuant to section 67(3), to order a common termination date for the two collective agreements and suggests a common date of November 8, 1994. Section 67(3) provides as follows:

"67.(3) The Board may, on application made jointly by both parties to a collective agreement, order that the termination date

of the collective agreement be altered for the purpose of establishing a common termination date for two or more collective agreements binding a single employer."

It is clear that section 67(3) requires such an application to be made "jointly by both parties to a collective agreement...". No such joint application is made in the present case and, accordingly, there is no need to deal further with this aspect of the IWA's request.

In the alternative, IWA argues that because the present application was not brought within 90 days of the November 8, 1994 termination date of the "second" bargaining agreement, the Board should dismiss it, pursuant to section 24(2)(c), as untimely.

The applicant, for its part, argues that the separate termination dates of the 2 collective agreements in question essentially operate to thwart the legitimate employee rights and interests to change or remove bargaining agents and be represented by a union of their own choosing.

IV

The IWA's alternative argument deals essentially with the single question of whether or not a collective agreement was "in force" in the sense that the time limits set out in section 24(2)(c) are brought into play.

In Alberta Government Telephones Commission (1991), 76 di 172 (CLRB no. 726), the Board addressed the issue of the legality of multiple collective agreements within a single certified unit. At page 184 it said:

"...In looking at the Code, it is clear to us that a certification implies a single collective agreement; that parties cannot negotiate more than one collective agreement where there is a single certification order... We are drawn to that conclusion following an analysis of various provisions of the Code. Section 48 (formerly section 146) of the Code permits either a newly certified bargaining agent or the employer to call upon the other to commence collective bargaining for the purpose of entering into a 'collective agreement.' Section 49 (formerly section 147) extends that to permit either party to a collective agreement, within three months of its expiry, to require the other party to commence bargaining, to renew or revise the collective agreement, or to enter into 'a new collective agreement.' In both these situations, the language can certainly be read as implying that there shall be one agreement containing the whole of the arrangement between the parties.

The idea of a single agreement is reinforced by section 67(3) (formerly section 160(3)) which contemplates the alteration of the termination date of a collective agreement 'for the purpose of establishing a common termination date for two or more collective agreements binding a single employer.' The subsection does not refer to two or more agreements binding the parties to the agreement to be revised; rather it refers only to the employer. This may suggest that Parliament was contemplating the existence of two or more agreements only in respect of distinct bargaining units. To read section 67(3) (formerly section 160(3)) as contemplating the possibility of there being two or more collective agreements as between the same parties vis-à-vis a single bargaining unit would allow for the possibility of two different termination dates affecting the relationship between the bargaining agent and the employer. This appears to frustrate section 24(2) (formerly section 124(2)) which in part conditions the right to apply for certification upon the termination date of an existing agreement. If there were two termination dates affecting the relationship between the collective bargaining agent and the employer arising out of two distinctive agreements, the provisions of section 24 (formerly section 124) with respect to certification

applications could not work. Similarly, section 80 (formerly section 171.1), which deals with the settlement of a first collective agreement, is instructive. That agreement which would be settled by the Board is said to constitute the collective agreement between the parties except to the extent that the terms and conditions are subsequently amended by the parties."

In our view, the existence of two collective agreements, with different termination dates, purporting to represent employees in a single Board-certified unit is inconsistent with the terms of section 24(2) of the Code and, therefore, ineffectual vis-à-vis the time limitations contained therein. Section 24(2)(c) provides that the time limitations apply: "... where a collective agreement applicable to the unit is in force..." (emphasis added).

In the present case, neither of the collective agreements entered into between the employer and the intervenor is, in the language of the statute, "applicable to the unit". The Code clearly specifies the unit for which a collective agreement must have been concluded before the shield of timeliness, provided in section 24(2)(c), can be raised against a subsequent certification application. In order to avail itself of the protection provided by those time limitations, the respondent must show at a minimum that its collective agreement covers all the members of the unit for which it was certified; see Canadian Broadcasting Corporation (1982) 44 di 19; and 1 CLRBR (NS) 129 (CLRB no. 383). In the circumstances no such agreement is in force, and the intervenor cannot, therefore, invoke the provisions of section 24(2)(c) in an effort to defeat the present application.

The applicant is therefore left in the position of having to bring its application in compliance with the time limits prescribed by section 24(2)(b) or "with the consent of the Board, at any earlier time".

With one agreement expiring on January 31, 1993, and the other on November 8, 1994, it would have been impossible for the applicant to bring the present application within a time frame that would satisfy the requirements of section 24(2)(c), with respect to both agreements, or with regard to section 24(2)(b), respecting the anniversary date of the certification order. Faced with these choices, the applicant opted for the open period as it related to the "first" agreement which expired on January 31, 1993.

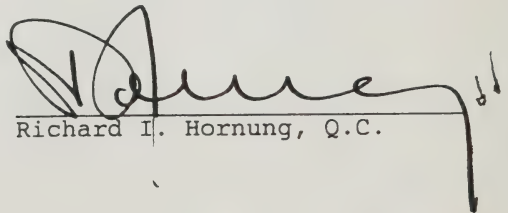
The different termination dates of the two collective agreements were negotiated by the IWA and employer notwithstanding the Board's certification order which directed all employees now covered by these two collective agreements to constitute a single unit. Without ascribing any improper motive to the parties, it is nevertheless clear that their actions put the applicant in the untenable position of having to choose arbitrarily one of three mutually exclusive conceivable dates to bring this application. No adverse consequences should therefore be visited on the applicant for choosing the application date it did.

In our view, the circumstances of this case warrant the Board exercising its discretion, as provided by section 24(2)(b); see Terminal Maritime Pointe Au Pic (1984), 56 di 240 (CLRB no. 477), to allow the present application to be brought when filed.

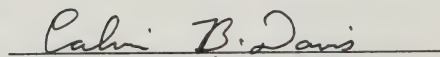
VI

The Board therefore allows the application as timely in the circumstances and directs that a representation vote of the employees in the unit certified by the Board be held.

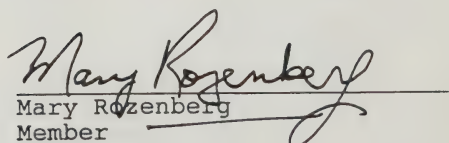
With respect to the intervenor's complaint pursuant to section 96, the Board has reviewed the circumstances and exhibits on file and concludes that the material does not disclose an offence pursuant to section 96. Accordingly, the Board dismisses the intervenor's complaint in that regard (Board File 745-4415).



Richard I. Hornung, Q.C.



Calvin B. Davis
Member



Mary Rozenberg
Member

DATED at Ottawa this 6th day of April, 1993

Information

This is not an official document.
Only the Reasons for Decision can be
used for legal purposes.

Ce document n'est pas officiel.
Seuls les Motifs de décision peuvent
être utilisés à des fins juridiques.

Summary

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
COMPLAINANT, AND CANADIAN AIRLINES
INTERNATIONAL LTD., RESPONDENT.

Board File: 745-4326

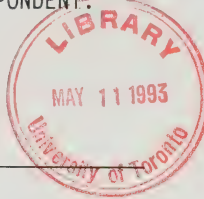
Decision No.: 1006

Résumé de Décision

ASSOCIATION INTERNATIONALE DES
MACHINISTES ET DES TRAVAILLEURS DE
L'AÉROSPATIALE, PLAIGNANTE, ET LIGNES
AÉRIENNES CANADIEN INTERNATIONAL
LTÉE, INTIMÉE.

Dossier du Conseil: 745-4326

Décision n°: 1006



While an application for certification of an expanded group of employees was pending, pursuant to section 18 of the Code, the employer dismissed the complainant. The union brings an application alleging violation by the employer of sections 24(4), 94(1), 94(3)(a) and 96 of the Canada Labour Code (Part I - Industrial Relations).

In this complaint the Board deals with the question of whether or not the "freeze" provisions of section 24(4) apply to the employer in circumstances where the application, to include previously excluded employees in the unit, is made pursuant to section 18 of the Code.

The Board determines that the language of section 24(4) is intended to ensure the application of that section to an employer in circumstances where the union's application is made and determined in accordance with the requirements of section 24(1) although not necessarily pursuant to it.

The Board concludes that although the freeze provisions of section 24(4) apply, the dismissal of the complainant was nevertheless taken by the employer on a "business as usual" basis. In addition, the Board concludes that anti-union animus had no part to play in the employer's decision to terminate the complainant.

In the result, the application is dismissed.

Pendant qu'une demande d'accréditation visant un groupe d'employés élargi était en instance, en vertu de l'article 18 du Code, l'employeur a congédié la plaignante. Le syndicat allègue que l'employeur a enfreint les dispositions 24(4), 94(1), 94(3)(a) et 96 du Code canadien des relations du travail (Partie I - Relations du travail).

Dans cette plainte, le Conseil traite de la question de savoir si les dispositions sur le «gel» prévues au paragraphe 24(4) s'appliquent à l'employeur lorsque la demande visant à inclure dans l'unité des employés auparavant exclus est présentée en vertu de l'article 18.

Le Conseil juge que le libellé du paragraphe 24(4) vise à assurer que cette disposition s'applique à l'employeur lorsque la demande du syndicat est présentée et réglée conformément aux exigences du paragraphe 24(1), même si elle ne l'est pas nécessairement en vertu de cette disposition.

Le Conseil conclut que même si les dispositions sur le gel prévues au paragraphe 24(4) s'appliquent, le congédiement de la plaignante a néanmoins été considéré par l'employeur comme une «pratique courante». De plus, le Conseil conclut que la décision de l'employeur n'était d'aucune façon entachée de sentiment antisyndical.

La demande est donc rejetée.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

International Association of
Machinists and Aerospace
Workers,

complainant,

and

Canadian Airlines
International Ltd.,

respondent.

Board File: 745-4326

The Board was composed of Mr. J. Philippe Morneault
and Mr. Richard I. Hornung, Q.C., Vice-Chairs, and
Mr. Calvin B. Davis, Member.

Appearances:

Mr. R.K. McDonald, for the complainant; and
Mr. W.G. Rilkoff, for the respondent.

The reasons for this decision were written by
Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

This application concerns a complaint filed by the
International Association of Machinists and Aerospace
Workers ("IAM") alleging violation by Canadian Airlines
International Ltd. ("CAIL"), of sections 24(4), 94(1),
94(3)(a) and 96 of the Canada Labour Code.

II

On August 29, 1990, the Board certified the union to represent a unit of employees of the respondent employer (Board File 530-1862) comprised of:

"all employees of Canadian Airlines International Ltd. working as:

analysts and project leaders employed in the Systems Planning and Control Department, excluding supervisor, systems planning and control and those above;

instructors/developers, technical instructors/developers and senior instructors employed in the Technical Training Section of the Training Department, excluding manager, technical training and those above;

senior engineers - operations, senior engineers - performance, senior engineering analysts, engineering analysts, analysts (I, II, III), technical analysts - operations support, senior analysts - aeronautical services, analysts aeronautical services, senior analysts, operations support, analysts - operations support in the Flight Technical and Operations Support Department, excluding manager, aeronautical services, manager, flight technical and manager, flight planning and those above;

inventory controllers and senior inventory controllers in the Material Planning and Control Department, excluding supervisor, inventory control and those above"

On August 6, 1992, the union applied to the Board, pursuant to section 18, for a variance of their existing certification order to include:

"buyers, senior buyers, buyer analysts, purchasing co-ordinators in the Purchasing Department"

That application was granted on November 16, 1992 (Board File 530-2109).

On September 15, 1992, CAIL terminated Shelley Thorne's employment as a "buyer/analyst" with CAIL. At that time Ms. Thorne was advised that the termination decision was taken as a consequence of the severe economic downturn facing the industry, the reorganization of CAIL personnel, and the consequent downsizing of its operations, (Exhibit 1(b)).

Ms. Thorne, however, alleges that her dismissal was due to her participation in the organizing campaign which led to the August 6, 1992 certification application.

III

The relevant sections of the Code read as follows:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

...

24.(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit.

...

(4) Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until

(a) the application has been withdrawn by the trade union or dismissed by the Board, or

(b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit,

except pursuant to a collective agreement or with the consent of the Board."

...

28. Where the Board

(a) has received from a trade union an application for certification as the bargaining agent for a unit,

(b) has determined the unit that constitutes a unit appropriate for collective bargaining, and

(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

...

94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

(b) contribute financial or other support to a trade union.

...

94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

IV

CAIL argues that insofar as the present application to amend the bargaining unit is brought pursuant to section 18 of the Code, the "statutory freeze" imposed on the employer by section 24(4) does not apply.

The union's response, contained in its brief, is as follows: "The short answer ...is that the application for variance is initiated under section 18, but that 'triggers' the review or reconsideration of the original certification, all of which is under section 24".

V

The freeze provision in section 24(4) (previously section 124(4) of Part V) was added to the Code on June 1, 1978 by Bill C-8. Prior to that time, the only protection for employees against radical changes of working conditions made by their employer during an organizing drive was to be found under the unfair labour practice provisions. And, the statutory freeze on terms and conditions of employment took effect only upon giving notice to bargain under section 148(b) of Part V of the Code (now section 50(b)).

When Parliament amended the Code in 1978, it recognized that it was crucial to prevent an employer from unduly exercising its management rights during a union's organizing campaign and that such unilateral action was "...contrary to the cooperative relationship envisioned by and sought to be promoted in the Canada Labour Code,

Part V"; see Air Canada (1977), 24 di 203 at page 214, (CLRB no. 113).

The objectives section 24(4) seeks to achieve are twofold:

"Firstly, to consolidate and protect the integrity of the right of association recognized by section 110 of the Code by preventing the employer from acting so as to intimidate, interfere with or in any way attempt to manipulate the bargaining unit covered by the application for certification.

Secondly, to preserve the status quo in a business which is the object of an application for certification, from the time the employer has been notified that an application has been made, in order to maintain the fundamental equilibrium between the parties until collective bargaining in proper form has commenced, pursuant to section 148"

Bessette Transport Inc. (1981), 43 di 64 at pages 75-76, (CLRB no. 299)

Section 24(4) precludes the possibility of employer pressure on the employees during that critical stage where, according to the Code and Board policy, a representation vote could be ordered. Such vote could otherwise become meaningless because of employer manipulation of the employees' rights or privileges or their terms or conditions of employment. On the other hand, if the union's application to be certified as a bargaining agent for a group of employees is not successful, section 24(4) serves only to preserve the status quo during the interim period and the relationship between the employer and the employees will be undisturbed.

Given the fact that the freeze is only temporary, and that the employer can carry on its business as before, the intrusive effect of section 24(4) on employers' property rights is confined to reasonable limits.

VI

The discretionary powers conferred on the Board, pursuant to section 18, can only be used in reference to previous Board decisions or orders; and, in applying the same, the Board must act in conformity with other provisions of the Code; see Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRBR no. 383). Accordingly, the Board's power and authority to act on the Union's application of August 6, 1992 to enlarge the unit, exists only in reference to its original certification order; and, provided that it exercises that authority in accordance with the statutory provisions and policy considerations which govern an application brought pursuant to section 24(1) of the Code.

Where the request is to enlarge the unit to include previously excluded employees, as is the case here, the Board, in exercising its discretion under section 18, determines the application, with the exception of the time requirements contained in section 24(2), in accordance with the same rules and principles as it applies to initial certification applications brought pursuant to section 24(1) and granted under section 28; see British Columbia Telephone Co. (1977), 22 di 507; [1977] 2 Can LRBR 404; and 77 CLLC 16,108 (CLRBR no. 99); Teleglobe Canada (1979), 32 di 270 at page 305;

[1979] 3 Can LRBR 86; and 80 CLLC 16,025; (CLRB no. 198); British Columbia Telephone Company (1979), 38 di 145 (CLRB no. 221); and CBC v CUPE (CLRB no. 1004). This limitation ensures, as was done here, that the wishes of the employees affected by the modification to the existing unit be canvassed and the appropriateness of the revised unit be determined; see Eastern Provincial Airways (1963) Limited (1978), 29 di 44; and [1979] 1 Can LRBR 456 (CLRB no. 159); Teleqlobe, *supra* at pages 120 and 311. In reaching its conclusion in this regard, the Board may order a representation vote; see Marine Atlantic Inc. (1990), 82 di 91; and 91 CLLC 16,001 (CLRB no. 822). This is a particularly significant consideration in light of the fact that the object purpose of section 24(4) is, as indicated, to preclude the possibility of employer pressure on employees during the critical period where a representation vote could be ordered.

VII

Section 24(4) provides that:

"Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section,..."

(emphasis added).

In order to interpret properly section 24(4), the words of the section must be read in their:

"entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, and the intention of Parliament"

(Elmer E. Dreidger, Construction of Statutes 2nd edition, (Toronto: Butterworths, 1983), p.87)

The language of section 24(4) indicates that it is intended to apply in circumstances where an application is brought in accordance with section 24. Although brought pursuant to section 18 of the Code, the union's application is in substance one for certification as the bargaining agent for the group of employees it considers appropriate for collective bargaining purposes. The jurisprudence, referred to above, makes it clear that the Board will only grant orders, pursuant to section 18, to include employees previously excluded if the application, so brought, is made in accordance with the requirements (excluding time limitations), which govern an application for certification brought pursuant to section 24(1). Insofar as the union is obliged to ensure that its request complies with the requirements of an application brought pursuant to section 24(1), it follows implicitly that the strictures of section 24(4) apply to preclude the proscribed employer conduct during the critical period when union support is determined.

The consequence of accepting the opposite conclusion is that it would allow the employer, while the application is pending, to unilaterally change terms or conditions of employment of those employees who choose to be added into the unit represented by the bargaining agent and, ultimately, allow the employer to manipulate the amended bargaining unit covered by the application for review. Conversely, it would also drive unions to resort to applications for certification when indeed what is required is merely an extension of the existing unit.

Applying the purposive interpretive standard urged by Dreidger, it is our view that the expression: "...in accordance with this section..." is permissive, and ensures the application of section 24(4) to an employer in circumstances where the union's application is made and determined in accordance with the requirements of section 24(1) although not necessarily pursuant to it. Interpreting the language in this fashion, ensures that the objectives which section 24(4) seeks to achieve, (Bessette Transport, supra), and the mischief it was intended to prevent, (i.e. precluding an employer from unduly exercising its management rights during an organizing campaign), would be achieved in all circumstances under the Code where the union applies to be certified as bargaining agent for an unrepresented appropriate unit.

It would otherwise be completely anomalous for the Board to determine the Union's amendment application, brought pursuant to section 18, on the principles which apply to section 24(1) applications and not, at the same time, apply the concurrent required standard of conduct to the employer as prescribed by section 24(4). It follows that if the provisions of section 24 apply at all, which they do, they must apply equally to both parties.

By virtue of section 24, the statutory freeze imposed on the terms and conditions of employment applies: "...except pursuant to a collective agreement or with the consent of the Board." Neither of those exceptions are in evidence here. Accordingly, the statutory freeze provisions of section 24 apply to the employer in the present case.

VIII

It is therefore incumbent on the union to show, on objective criteria, that in the circumstances the termination of Ms. Thorne's employment was as a result of the employer's departure from "business as before" considerations; see National Bank of Canada (1987), 70 di 146 (CLRB no. 637); Mid-Continental Tank Lines Inc. (1986), 64 di 97; and 12 CLRBR (NS) 138 (CLRB no. 558); Québec Aviation Limitée (1985), 62 di 41 (CLRB no 522). On the other hand, with respect to the balance of the complaint, the onus is on the employer, by virtue of section 98(4), to demonstrate that the termination of Ms. Thorne was not tainted by anti-union animus and therefore in breach of section 94(3).

SECTION 24(4) COMPLAINT

As early as June 1991, the employer advised the union that it would be reducing positions as a result of the introduction of a new computer system in the Buyers Department. Further, the corporation's budget of October 2, 1991 indicated a reduction of four buyers by the end of July 1992. Although the employer deviated from its proposed reduction of positions by virtue of hiring other individuals during the ensuing year, it is nevertheless clear that a plan of action was in place with respect to the reduction and downsizing of the Buyers Department.

The decision to terminate Ms. Thorne was taken by Mr. Dempsey, after consultation with Messrs. Doyle and Russell, in accordance with a process used earlier by these parties with respect to terminations in CAIL's

downsizing program. Although the Board may have reservations about the soundness of the employer's decision in terminating Ms. Thorne in place of an apparently lesser qualified individual, it is not for us to rule on the method by which the employer chooses to assess its employees' capabilities; see Canadian Imperial Bank of Commerce, Gibsons, B.C. (1978), 27 di 748 (CLRB no. 133).

In short, although the provisions of section 24(4) apply, we are satisfied that the decision to terminate Ms. Thorne was nevertheless taken by the employer on a "business as usual" basis.

SECTION 94(1), 94(3)(a) and 96 COMPLAINTS

In July 1992, the employees in the Buyers Department began discussions and meetings with a view to joining the applicant union. On July 29, 1992, a meeting of affected employees took place at the union's office at Richmond, B.C. In essence, it was at this meeting that Ms. Thorne alleged her active participation in the union took place. Approximately 20 employees attended the meeting and it is undisputed that Ms. Thorne, as well as others, favoured representation by the applicant trade union. Ms. Thorne's participation or enthusiasm at joining the union, in our view, did not exceed that of others who also professed their union support. By her own admission, Ms. Thorne indicated that she was no more or less supportive of the union except that she may have spoken loudest in order to get the employees' attention at the meeting.

Following the certification application on August 6, 1992, meetings were held between management and the employees in the Buyers Department at which the pending application before the Board was discussed. One of those meetings, called by the employer, was attended by all the Senior Buyers, Purchasing Co-ordinators and Buyers. In addition, Chris Anderson, the union's Airline General Chairperson, was present. Mr. Anderson was able, at that time, to clearly represent the union's interests to the employees in attendance.

The union argued that the coincidental timing of the meetings surrounding the application indicated the employer's opposition to it and exhibited the "requisite" anti-union animus necessary to induce the Board to find on the union's behalf in this application.

We do not agree. The parties here have a long-standing labour relationship. The meetings that were held subsequent to the certification application appear to have been designed solely to inform and advise and to ensure the continued harmonious operation of the department affected; they were in line with the co-operative attitude exhibited in the past by management and the union.

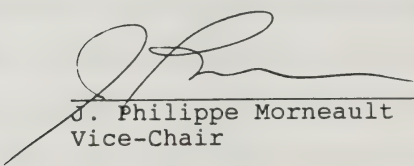
We cannot, therefore, conclude that the meetings evidenced any anti-union animus or any attempt by management to intimidate or influence negatively the employees with respect to their union participation.

Finally, it was argued that the conduct of one Mr. McKoryk, in telephoning Ms. Thorne following the filing

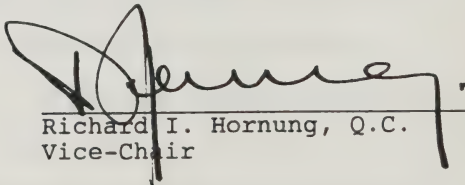
of the present application, constituted an attempt, on behalf of the company, to either intimidate her or otherwise dissuade her from bringing the present application, and was therefore indicative of the employer's anti-union animus. Little can be gained, from anyone's perspective, in detailing the conduct of Mr. McKoryk and Ms. Thorne with respect to their communications. It suffices to say that the Board does not view the conduct of McKoryk in the negative light urged on us by counsel for the union. In our view, his conduct, although in hindsight ill conceived, was nevertheless motivated by a personal concern for Ms. Thorne.

In the circumstances we cannot conclude that Ms. Thorne was terminated as a result of any anti-union animus or breach, by the employer, of sections 94(1), 94(3)(a) or 96.

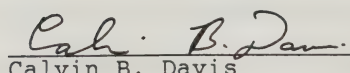
In the result, the application is dismissed.



J. Philippe Morneau
Vice-Chair



Richard I. Hornung, Q.C.
Vice-Chair



Calvin B. Davis
Member

DATED at Ottawa this 20th day of April, 1993.

information

This is not an official document. Only the Reasons for decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

SUMMARY

Canadian Union of Public Employees, applicant, CBC Managers' Association, intervenor, Canadian Wire Service Guild, Local 213 of the Newspaper Guild, National Association of Broadcast Employees and Technicians, and Association of Television Producers and Directors (Toronto), certified bargaining agents, Canadian Television Producers' and Directors' Association, National Radio Producers' Association, and Alliance of Canadian Cinema, Television and Radio Artists, bargaining agents, Canadian Broadcasting Corporation, employer, and Claude Latrémouille, intervenor.

RÉSUMÉ

Syndicat canadien de la Fonction publique, requérant, Association des cadres de Radio-Canada, intervenante, Guilde des services de presse du Canada, section locale 213 de la Guilde des journalistes, Syndicat national des travailleurs et travailleuses en communication et Association des réalisateurs et directeurs de télévision (Toronto), agents négociateurs accrédités, Association des réalisateurs et directeurs de télévision canadienne, Association nationale des réalisateurs de la radio et Alliance des artistes canadiens du cinéma, de la télévision et de la radio, agents négociateurs, Société Radio-Canada, employeur, et Claude Latrémouille, intervenant.

Board File: 530-1827

Dossier du Conseil: 530-1827

Decision No.: 1007

Décision n^o: 1007

Interim decision. Section 20(1) of the Canada Labour Code (Part I - Industrial Relations). Managers' Association and individual petitions asking for a vote in newly defined bargaining unit after a global review of bargaining units. Motion dismissed since a union has majority support. Mail vote ordered in unit where no majority.

Décision partielle. Paragraphe 20(1) du Code canadien du travail (Partie I - Relations du travail). Association de cadres et individus demandent la tenue d'un scrutin auprès des membres d'une nouvelle unité de négociation établie à la suite de la révision globale des unités de négociation. Demande rejetée vu qu'un syndicat jouit de la majorité. Un scrutin par courrier a été ordonné dans unité où il n'y a pas majorité.

Following the global review of the collective bargaining structure of CBC's English network, the Board had determined that there should be three bargaining units (Canadian Broadcasting Corporation (1991), 84 di 2 (CLRb no. 846)). A vote is not compulsory in every case of

À la suite de la révision globale de la structure de négociation collective au réseau anglais de Radio-Canada, le Conseil avait jugé qu'il devrait y avoir trois unités de négociation (Société Radio-Canada (1991), 84 di 2 (CCRT n^o 846)). Un scrutin n'est pas obligatoire dans tous les cas

global review (Canadian Broadcasting Corporation (1993), as yet unreported CLRB decision no. 1004). The investigation by a Board officer into union support showed that there was no majority in one of the units. A vote was ordered.

Global review proceedings are subject to the rules governing certifications.

The investigation into union support shows majority in two bargaining units. A vote is not warranted where union membership evidence shows majority support in favour of one union. Signing a petition is not proper way to secure a vote.

Where there is majority support (63% in the instant case), no vote was found warranted. Membership evidence was found to be reliable. A vote cannot be used to circumvent provisions of the Code on proper ways to organize employees.

de révision globale (Société Radio-Canada (1993), décision du CCRT n° 1004, non encore rapportée). L'enquête d'un agent du Conseil sur le caractère représentatif des syndicats en présence a révélé qu'il n'y avait pas de majorité au sein de l'une des unités. Un scrutin a été ordonné.

Une révision globale est soumise aux règles relatives à l'accréditation.

L'enquête du Conseil révèle qu'il y a majorité dans deux unités de négociation. Il n'y a pas lieu d'ordonner un scrutin quand la preuve d'adhésion syndicale révèle l'existence d'une majorité en faveur d'un syndicat. La signature d'une pétition n'est pas un moyen d'obtenir un scrutin.

Là où l'enquête a révélé l'existence d'une majorité (en l'occurrence 63 %), le Conseil a jugé qu'un scrutin n'était pas indiqué. L'enquête a démontré que les preuves d'adhésion syndicales étaient valides et fiables. On ne peut demander un scrutin pour contourner les dispositions du Code relatives à la façon de syndiquer des employés.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnements et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Canadian Union of Public
Employees,

applicant,

and

CBC Managers' Association,

intervenor,

and

Canadian Wire Service Guild,
Local 213 of the Newspaper
Guild, National Association of
Broadcast Employees and
Technicians, and Association of
Television Producers and
Directors (Toronto),

certified bargaining agents,

and

Canadian Television Producers'
and Directors' Association,
National Radio Producers'
Association, and Alliance of
Canadian Cinema, Television and
Radio Artists,

bargaining agents,

and

Canadian Broadcasting
Corporation,

employer,

and

Claude Latrémouille,

intervenor.

Board File: 530-1827

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. J. Jacques Alary and François Bastien,
Members.

Appearances:

Ms. Suzanne Thibaudeau, Q.C., and Mr. Guy Dufort, assisted
by Mr. Claude Labrecque, Assistant Director,
Industrial Relations, for the applicant;

Mr. Paul J. Falzone, assisted by Ms. Christine Jacobs, National Executive Director, for the Alliance of Canadian Cinema, Television and Radio Artists;

Mr. Aubrey E. Golden, Q.C., assisted by Mr. Dan Oldfield, Assistant Business Manager, for the Canadian Wire Service Guild, Local 213 of the Newspaper Guild;

Mr. Gaston Nadeau, assisted by Mr. Gordon Johnson, Broadcast Division Director, for the Canadian Union of Public Employees;

Mr. Ronald Pink, Q.C., and Mr. David Roberts, assisted by Mr. Gordon Hunter, National President, for the National Association of Broadcast Employees and Technicians;

Mr. Howard Goldblatt, for the Association of Television Producers and Directors (Toronto) and the Canadian Television Producers' and Directors' Association;

Mr. David W.T. Matheson, assisted by Ms. Dale Heckman, Executive Director, for the National Radio Producers' Association;

Mr. Jean-Jacques Bérard, for the CBC Managers' Association (ACMA); and

Mr. Claude Latrémouille, on his own behalf.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman. They were first issued in letter decision format (Canadian Broadcasting Corporation, April 23, 1993 (LD 1153)).

I

This is an interim decision made pursuant to section 20(1) of the Canada Labour Code (Part I - Industrial Relations). It follows a hearing held on April 13 and 14, 1993, in Ottawa. This decision deals with outstanding issues

pertaining to union support, following the global review of the bargaining units of the English network of the Canadian Broadcasting Corporation (hereinafter CBC) (see Canadian Broadcasting Corporation (1991), 84 di 2 (CLRB no. 846); and Canadian Broadcasting Corporation (1993), as yet unreported CLRB decision no. 1004). In particular, these reasons follow the Board's investigation on union support in each of three newly defined bargaining units. The Board dismisses motions or petitions to hold votes in two of the three units and orders a vote in one of them.

II

1. Managers' Association's Application for a Vote in the General Administrative Unit

The Board has considered the CBC Managers' Association's (hereinafter ACMA) motion that a separate vote be held among those employees who are currently non-unionized and whose positions have been (or might be) determined to come under the intended scope of the General Administrative Unit (Unit No. 3). ACMA makes particular reference to employees who have long been considered by the CBC to hold confidential or managerial positions.

According to ACMA's representative, these individuals should be allowed to vote separately on whether or not they wish to be unionized.

The current exclusion of those positions from the existing office employee unit has long been challenged by the Canadian Union of Public Employees (CUPE). In fact, the Board never in the past determined that those positions

actually warranted exclusion. In effect, they were strictly the result of management's unilateral action.

This, as everyone familiar with labour relations knows, is often the case in a long-standing collective bargaining relationship. It does not, however, suggest any bad faith on the part of any party, let alone on the part of the individuals involved. Be that as it may, the vast majority of those additions to Unit No. 3, at least until now, are the result of either the CBC recognizing outright that their exclusion was not warranted in light of the intended scope of the newly defined Unit No. 3, or the result of an agreement between the CBC and CUPE, later approved by the Board.

When examined at close range, ACMA's submissions are really two-pronged.

First, ACMA suggests on behalf of individual employees that their inclusion in a bargaining unit - as opposed to a union - touches on their fundamental freedom of association. For that reason, they should be allowed to vote before being included in a bargaining unit. With all due respect, we cannot agree. The inclusion of a position in a unit is an issue turning on the notion of appropriateness which comes under section 28(b) of the Code. Such determination is in the end the sole province of the Board.

The parties will recall the Board's earlier ruling in these proceedings denying standing to intervenor Claude Latrémouille on the issue of the appropriateness of bargaining units. We did so on the grounds that such an issue is one involving unions and employers, not

individual employees. We find no valid reason to depart from that finding at this juncture.

ACMA's second argument relates more closely to the issue of union support and employee wishes pursuant to section 28(c) of the Code. Indeed, it suggests that those newly included employees favour ACMA and not CUPE, and that they should be allowed the opportunity to vote for it as a bargaining agent.

ACMA's position presupposes that ACMA would have established its status as a "trade union" within the meaning of sections 3(1) and 28(a) of the Code, a status ACMA has never claimed to have. ACMA's position is, somewhat ironically, similar to the one held by CUPE with regard to the National Association of Broadcast Employees and Technicians (hereinafter NABET) and the Technical Trades and General Labour Unit (Unit No. 2). There, CUPE argued that the Board had to hold a vote regardless of NABET's eventual overall majority position within the unit. In essence, CUPE's request was made on the basis that some of its own supporters were being added to the unit. It was suggested that since those CUPE supporters were being "forced" into Unit No. 2 and did not belong to NABET, they were entitled to a vote. The Board dismissed that suggestion as ill-founded. The reasons for that decision are applicable to ACMA in the instant case. (See Canadian Broadcasting Corporation (1004), supra).

2. Determination of Union Support in the Three New Units

As the Board stated in Canadian Broadcasting Corporation (1004), supra:

"... the matter of whether the support established by membership numbers in the instant case will actually be deemed satisfactory is one that remains for the Board to determine, particularly in light of all relevant labour relations considerations."

(page 13)

The Board proceeded to investigate union support within the three units of the English network and specifically examined the membership evidence of each union seeking bargaining rights in the new bargaining structure. All agree there is no majority situation in the Production and Presentation Unit (Unit No. 1). As there is no majority in Unit No. 1, it follows that a vote is needed to ascertain the wishes of the majority. Such a vote is hereby ordered.

Each bargaining agent involved in Units No. 2 and 3 has been provided on a confidential basis with their respective score pursuant to section 25 of the Regulations.

With respect to Unit No. 2, initially, an objection was raised by CUPE following the issuance of Canadian Broadcasting Corporation, February 18, 1993 (LD 1115) (since reissued as decision no. 1004, supra) on the reliability of membership evidence in support of NABET. CUPE questioned the validity of union membership application forms signed as of May 1, 1992. It was suggested that such applications, if they indeed existed, should not be relied on to determine union support since they would come after the cut-off date of April 30, 1992 (see Canadian Broadcasting Corporation, May 5, 1992 (LD 1023)).

Following its objection, CUPE was provided with the most recent information concerning the dates on which some employees of Units No. 2 and 3 signed up with different unions in the course of the last year. CUPE then withdrew its objection.

Even if we need not decide as such the issue raised by CUPE, the Board wishes to state that there is no valid reason to disregard membership evidence which is contemporary to the officer's report. Inasmuch as any employee could, within the same period, resign from his or her current union and sign up with another one, it is difficult to see on what basis an employee not already belonging to a union should have been denied the right to join one. In practical terms, the confidential report filed with the Board shows that even if we had upheld CUPE's argument, it would not have affected the majority situation within Unit No. 2.

The Board also received "petitions" signed by approximately 1130 individual employees asking that a vote be held in Unit No. 2. We understand that the signing of these petitions was sponsored by CUPE. As per the Board standard policy, the labour relations officer assigned to the case reviewed the petitions and ascertained that the signatories were indeed members of Unit No. 2. He reported his findings to the Board under section 25 of the Regulations. That report does not show that any of the signatories of the petitions have resigned from the union currently representing them, nor have indicated that such was their wish.

The Board regularly receives such petitions in the context of organization drives. Their stated purpose is often to

have the Board change the date at which union support will be canvassed pursuant to section 28(c) of the Code or to have the Board disregard for some reason the evidence of union support based on membership applications.

The real purpose of those petitions is similar to ACMA's above-mentioned motion with regard to a vote in Unit No. 3. Not surprisingly, they also echo in some respects CUPE's earlier motion asking for a vote in Unit No. 2. As already mentioned, both ACMA's and CUPE's motions were ill-founded.

The Board's policy on petitions goes back a long way (see Swan River - The Pas Transfer Ltd. (1974), 4 di 10; [1974] 1 Can LRBR 254; and 74 CLLC 16,105 (CLRB no. 8). That decision was later overturned by the Federal Court of Appeal, but on different grounds (see CKOY Limited v. Ottawa Newspaper Guild, Local 205, [1977] 2 F.C. 412; (1977), 74 D.L.R. (3d) 229; and 77 CLLC 14,093). That policy is linked to the Board's broader policies on union support in matters of certification.

The gist of that policy is that the Board will rely primarily on membership evidence in order to ascertain union support in a certification application. (See Canadian Imperial Bank of Commerce (Victory Square Branch) (1977), 25 di 355; [1978] 1 Can LRBR 132; and 78 CLLC 16,120 (CLRB no. 104); Bank of Montreal (Tweed and Northbrook) (1978), 26 di 591; and [1978] 2 Can LRBR 123 (CLRB no. 124); and Hudson Bay Mining and Smelting Co., Limited (1993), as yet unreported CLRB plenary decision no. 999.) Thus, unless some unfair or illegal tactics are alleged, an employee who has signed up with a union is deemed to wish to continue to belong to that union until

he or she resigns from it or signs up with another one. Conversely, the signatories of union application forms must bear the responsibility for the decision they make when they sign up with a union or choose not to resign. Further, unless there are genuine reasons to disregard valid membership evidence, the Board is justified to rely on it. For instance, when a union wishes to displace another, a vote cannot be used to circumvent the requirement that it first sign up a sufficient number of employees within the unit (see Canadian Broadcasting Corporation (1004), supra).

In this case, the Board carefully weighed the evidence of these petitions as it is expected to do (Canadian Brotherhood of Railway, Transport and General Workers v. Victoria Flying Services Ltd., [1979] 1 S.C.R. 95; and (1978), 78 CLLC 14,182). Nothing in them suggests that union membership evidence pertaining to each signatory is no longer valid or reliable. Further, there is no reason to consider these petitions as an indication of a wish to quit the union to which the signatories belong. On the contrary, what the petitioners likely suggest is that they would prefer to keep their current union. The Board has found no valid reason to ignore the available membership evidence, particularly in light of the fact that it is unchallenged and in full compliance with Board Regulations.

Given the circumstances of this case, the Board sees fit to disclose the key results of its investigation on union support so as to better illustrate our decision. What the Board's investigation has shown in terms of numbers in Units No. 2 and 3 is as follows.

NABET holds a majority of 63.1% in Unit No. 2. Ranking second is CUPE at 15%. After having weighed all the evidence and the arguments, including that, on the cut-off date referred to in Letter Decision no. 1153, supra, the Board is satisfied pursuant to section 28(c) of the Code that, on the basis of the membership evidence available as of April 1993, the majority of the employees in the unit wish to have NABET represent them as their bargaining agent. There is therefore no reason to hold a vote in Unit No. 2.

In Unit No. 3, the situation is just about identical to that of Unit No. 2 in that CUPE holds a majority of 63.5%. There is a difference with Unit No. 2, in that except for a few, all the previously unionized employees in that unit belong to CUPE. A group of roughly 200 employees previously excluded by reason of so-called confidential or managerial positions may be added to the unit. Some of these belong to ACMA.

As the Board already indicated, global review applications are to be processed much like applications for certification. It follows that for the same reasons that it did not grant CUPE's nor the individual petitioners' requests to hold a vote in Unit No. 2, the Board does not consider that ACMA's request to hold a vote in Unit No. 3 is well-founded.

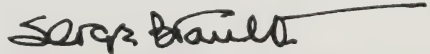
Having considered all the membership evidence and the submissions received, the Board is satisfied pursuant to section 28(c) of the Code that, on the basis of the evidence available as late as April 1993, the majority of the employees in Unit No. 3 wish to be represented by CUPE. Even if the Board were to add to the unit all the

positions currently excluded whose fate has not yet been determined, that would still not affect CUPE's majority position. There is therefore no reason to hold a vote in Unit No. 3.

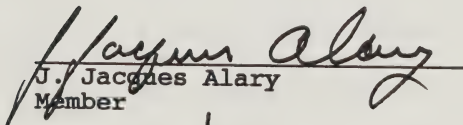
In summary, both CUPE's overall majority support in Unit No. 3 and NABET's in Unit No. 2 are quite comfortable and satisfactory under section 28(c) of the Code.

Finally, no sound labour relations purpose would be served by ordering a vote in either of Units No. 2 and No. 3. Given the duration and the nature of these proceedings, had the employees involved really wanted to change union affiliation they could have done so easily. They chose not to. Ignoring that basic fact and proceeding to a vote would serve no valid labour relations purpose.

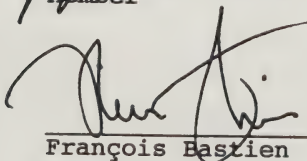
Insofar as the actual issuance of new certification orders for Units No. 2 and No. 3 is concerned, it will not occur until the fate of Unit No. 1 has been finally decided.



Serge Brault
Vice-Chairman



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 3rd day of May 1993.

information

This is not an official document.
Only the Reasons for Decision can
be used for legal purposes.

Ce document n'est pas officiel. Seuls
les Motifs de décision peuvent être
utilisés à des fins juridiques.

Summary

Montreal Port Corporation,
applicant, Syndicat national des
employés de bureau du Port de
Montréal (CNTU), respondent, and
Public Service Alliance of Canada,
mis-en-cause.

Board File: 610-124

Decision No.: 1008



Résumé de Décision

Société du Port de Montréal
requérante, Syndicat national des
employés de bureau du Port de
Montréal (CSN), intimé, et Alliance
de la Fonction publique du Canada,
mise en cause.

Dossier du Conseil: 610-124

Décision n° 1008

The Montreal Port Corporation filed with the Board an application pursuant to section 65 of the Canada Labour Code (Part I - Industrial Relations) seeking a determination concerning the bargaining unit, that is the unit represented by the Public Service Alliance of Canada (PSAC) or by the Syndicat national des employés de bureau du Port de Montréal (CNTU) (the Syndicat national), to which the newly created position of operations co-ordinator belongs.

The Board concluded that the work carried out by the operations co-ordinator is covered by the intended scope of the certification certificate held by PSAC and that, consequently, the incumbent is subject to that union's collective agreement.

The Syndicat national's certification certificate is amended by adding the position of operations co-ordinator to its list of exclusions.

The Board refers the case to an arbitrator who will deal with the grievance received, in accordance with the Board's decision.

La Société du Port de Montréal a présenté au Conseil une demande aux termes de l'article 65 du Code (Partie I - Relations du travail) visant à faire déterminer à quelle unité de négociation, soit celle représentée par l'Alliance de la Fonction publique du Canada (l'Alliance) ou par le Syndicat national des employés de bureau du Port de Montréal (CSN) (le Syndicat national), appartient le poste nouvellement créé de Coordonnateur aux opérations.

Le Conseil a décidé que le travail effectué par le Coordonnateur aux opérations fait partie de la portée intentionnelle du certificat d'accréditation détenu par l'Alliance et que, par conséquent, le titulaire du poste est lié par la convention collective de cette dernière.

Le certificat d'accréditation du Syndicat national est modifié afin d'ajouter le poste de Coordonnateur aux opérations à la liste des exclusions dudit certificat.

Le Conseil renvoie le dossier à l'arbitre pour qu'il décide du grief dont il est saisi en conformité avec la décision du Conseil.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnements et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Montreal Port Corporation,
applicant,
and

Syndicat national des
employés de bureau du Port de
Montréal (CNTU),

respondent,
and

Public Service Alliance of
Canada,

mis-en-cause.

Board File: 610-124

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
and Ms. Evelyn Bourassa and Ms. Mary Rozenberg, Members.

The hearing in this case was held in Montréal on June 16 and
17, August 7, and October 8, 1992.

Appearances

Ms. Carol Anne Laramée, accompanied by Mr. Jean-Pierre
Gauthier, labour relations manager, for the employer;
Mr. Jules Théoret, union advisor, accompanied by
Ms. Francine Gascon, president, for the respondent union;
Mr. James G. Cameron, accompanied by Mr. E. Labelle, for the
mis-en-cause.

These reasons for decision were written by Ms. Evelyn
Bourassa, Member.

I

On February 4, 1992, the Montreal Port Corporation (the
Corporation) filed with the Board an application pursuant to
section 65 of the Canada Labour Code. The Corporation asked
the Board to declare that the position of Operations
Coordinator, Harbour Master Office, created in May 1991, was

included in the bargaining unit of the Public Service Alliance of Canada (PSAC). In a letter of February 18, 1992, counsel for the employer also asked the Board to amend the certification certificate of the Syndicat national des employés de bureau du Port de Montréal (CNTU) (the CNTU) to include the position of Operations Coordinator in the list of excluded positions on page 3 of the certificate under the heading "Harbour Master Office."

The Board has already dealt with the scope of its powers under section 65 of the Code. This section gives the Board the authority to hear and determine any question referred to it by a party "relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement."

In Bell Canada (1982), 50 di 105 (CLRB no. 393), the Board stated that it has the power to deal with a jurisdictional conflict between rival unions. The solution lies in interpreting the certification orders, which the Board has exclusive power to do:

"... Consequently, the solution to any jurisdictional conflict over the employer's assignment of a particular function to members of one of two unions lies in the interpretation of the certificates, which only the Board has the power to do, with a view to determining the functions that each of the unions is authorized to represent. This process makes it clear which of the two unions represents the function at issue, and at the same time, identifies the incumbents of that function, as well as the collective agreement by which they are bound. Thus by exercising its power to interpret the certificates that it has issued, and that it alone is authorized to do under section 119 [now section 18] of the Code, the Board can identify the employees bound by a collective agreement."

(pages 118-119)

However, this exclusive power does not include the interpretation of the provisions of a collective agreement which are or which, in the Board's opinion, could be the

subject of a referral to arbitration by a party to the collective agreement. In such a case, after exercising its authority, the Board refers the matter to the arbitrator so that the conflict can be resolved in accordance with the Board's decision. (See Bell Canada, supra.)

For a review of past Board decisions pertaining to its power under section 65 of the Code, see the following cases: Eastern Provincial Airways (1963) Limited (1978), 30 di 82; and [1978] 2 Can LRBR 572 (partial report) (CLRB no. 142); Radio CJYQ - 930 Limited (1978), 34 di 617; and [1979] 1 Can LRBR 233 (CLRB no. 170); CJMS Radio Montréal (Québec) Ltée (1979), 34 di 803; and [1980] 1 Can LRBR 170 (CLRB no. 183); Télé-Métropole Inc. (1980), 41 di 286 (CLRB no. 270); Bell Canada (1981), 43 di 86; and [1982] 3 Can LRBR 113 (CLRB no. 300); Bell Canada (393), supra; Northern-Loram Joint Venture (1985), 59 di 180; and 9 CLRBR (NS) 218 (CLRB no. 498).

II

On March 25, 1988, the Board certified PSAC to represent a group of employees of the port of Montréal. It defined the bargaining unit as follows:

"all technical and professional employees of the Montreal Port Corporation, excluding all employees covered by other Certification Orders and the following positions:

*General Manager and Chief Executive Officer
Secretaries to the General Manager and Chief Executive Officer
Corporate Secretary
Secretary to the Corporate Secretary
Legal Advisor
Secretary to the Legal Advisor
Secretary to the Director/Police and Security Manager/Public Relations
Assistant General Manager
Secretary to the Assistant General Manager
Manager/Economic Studies
Director/Planning and Development
Secretary to the Director/Planning & Development
Manager/Facilities Planning
Manager/Engineering*

Section Chief/Construction
Project Manager/Grain Handling
Project Manager/Maritime Terminals
Director/Operations
Secretary to the Director/Operations
Manager/Maintenance
Section Chief/Electrical Installations
Section Chief/Material and Rolling Stock
Section Chief/Roads and Railways
Section Chief/Auxiliary Services
Section Chief/Grain Elevator Mechanical
Maintenance
Section Chief/Maintenance Planning
Chief/Real Estate Management
General Superintendent/Grain Elevators
Assistant General Superintendent
Superintendent/Grain Elevator #3
Superintendent/Grain Elevator #4
Superintendent/Grain Elevator #5
Manager/Railway Operations
Harbour Master/Harbour Master Office (HMO)
Director/Finance & Administration
Secretary to the Director/Finance &
Administration
Manager/Accounting
Chief/Data Processing
Supervisor/Systems & Programming
Chief/Budgeting & Auditing
Chief/Supplies
Chief/Internal Services
Director of Human Resources
Secretary to the Director of Human Resources
Labour Relations Officer
Secretary to the Labour Relations Officer
Chief of Personnel
Secretary to the Chief of Personnel
Chief/Occupational Safety and Health
Secretary to the Chief/Occupational Safety and
Health
Industrial Nurse
Personnel Officer
Secretary to the Personnel Officer
Personnel Technician
Project Officer/Personnel
Marketing Director
Secretary to the Marketing Director."

On the same date, the Board, further to an application pursuant to section 119 (now section 18) of the Code, amended the description of the bargaining unit of the CNTU and replaced it with the following description:

"all non-professional office employees of the Montreal Port Corporation, excluding all employees covered by other Certification Orders and the following positions in the various divisions of the Corporation:

Management

General Manager and Chief Executive Officer
Secretary to the General Manager
Corporate Secretary
Secretary to the Corporate Secretary

Manager, Public Relations
Copywriter
Information Officer
Legal Advisor
Secretary to the Legal Advisor

Police and Security

Secretary to the Director of Police & Security

Planning & Development

Director of Planning & Development
Secretary to the Director of Planning & Development
Manager/Economic Studies
Manager/Facilities Planning
Market Development Analyst
Manager/Engineering
Project Coordinator
Section Chief, Mechanical Engineering
Project Engineer/Mechanical Engineering
Design Chief/Mechanical Installations
Designer/Mechanical Installations
Section Chief/Electrical Engineering
Project Engineer/Electrical Engineering
Designer/Electrical Installations
Section Chief/Civil Engineering
Projects Engineer/Civil Engineering
Designer/Civil Engineering
Section Chief/Technical Surveys
Surveyance Technician
Section Chief/Construction
Site Engineer
Project Manager/Maritime Terminals

Operations

Director
Secretary to the Director of Operations
Manager/Maintenance
Building Maintenance Foreman
Section Chief/Electrical Installations
Electrical Installation Foreman
(Grain Elevator #3)
Electrical Installation Foreman
(Grain Elevator #4)
Electrical Installation Foreman
(Grain Elevator #5)
Electrical Installations Foreman
Transport Network Foreman
Section Chief/Equipment and Rolling Stock
Machine Shop Foreman
Building Mechanics Foreman
Rolling Stock Maintenance Foreman
Section Chief/Roads and Railways
Road and Railway Foreman
Plumbing Foreman
Section Chief/Auxiliary Services
Building Foreman
Aqueduct Foreman
Maintenance Foreman
Section Chief/Grain Elevator Mechanical Maintenance
Mechanical Foreman, Grain Elevator #3
Mechanical Foreman, Grain Elevator #4
Mechanical Foreman, Grain Elevator #5
Section Chief, Maintenance Planning
Maintenance Planning Officer
Electrical Maintenance Planner
Project Monitoring Officer

Mechanical Maintenance Planner
Chief, Real Estate Management
Real Estate Management Officer
Real Estate Management Analyst
General Superintendent, Grain Elevators
Trainee
Assistant General Superintendent
Superintendent, Elevator #3
Assistant Superintendent
Chief Weigher
Floor Foreman
Grain Unloading Foreman
Superintendent, Grain Elevator #4
Assistant Superintendent
Grain Unloading Foreman
Chief Weigher
Floor Foreman
Grain Unloading Foreman
Superintendent, Grain Elevator #5
Assistant Superintendent
Grain Unloading Foreman
Chief Weigher
Floor Foreman
Manager, Railway Operations
Supervisor, Railway Operations

Harbour Master Office

Harbour Master
Assistant Harbour Master/Maritime Traffic
Port Traffic Officer
Assistant Harbour Master/Terminal Supervision
Assistant Harbour Master/Fire and Disaster
Prevention
Fire and Disaster Prevention Officer
Assistant Harbour Master/Maritime Operations
Supervisor, Dredging and Floating Equipment
Dredging Foreman
Director, Finance and Administration
Secretary to the Director, Finance &
Administration
Manager, Accounting
Accountant, Accounts Receivable
Supervisor, Pay
Accountant, General Accounting
Chief, Data Processing
Supervisor, Operations
Systems Analyst
Programming Analyst
Programmer
Chief, Budgeting & Auditing
Project Analyst
Senior Financial Analyst
Financial Analyst
Chief, Supplies
Supplies Officer, Purchasing
Warehouse Supervisor
Chief Warehouseman
Chief, Internal Services
Supervisor, Records Management
Director of Human Resources
Secretary to the Director of Human Resources
Labour Relations Officer
Secretary to the Labour Relations Officer
Chief of Personnel
Secretary to the Chief of Personnel
Chief, Occupational Safety and Health
Secretary to the Chief, Occupational Safety and
Health
Industrial Nurse
Personnel Officer

*Personnel Technician
Project Officer, Personnel
Marketing Director
Secretary to the Marketing Director
Representative, Bulk Freight
Representative, General Freight
Representative, Specialized Freight."*

III

The present application is further to a grievance filed by the CNTU.

The background to these proceedings is as follows.

On April 5, 1991, at the conclusion of a labour dispute that lasted some 11 months, from April 27, 1990 to April 5, 1991, the Corporation and the CNTU signed a collective agreement and a back-to-work agreement. This agreement provided that the work normally performed by employees represented by the CNTU before the strike was declared would continue to be performed by the members of the bargaining unit.

On May 31, 1991, the Corporation posted a notice concerning the new position of Operations Coordinator, Harbour Master Office. According to the employer, the position was included in PSAC's bargaining unit.

The employer appointed the incumbent of a Pier Supervisor position, which was included in the CNTU's unit, to this newly created position.

At the time, the CNTU made the argument to the employer that the duties performed by the chosen candidate, Stephen Masters, were the duties that he had been performing as Pier Supervisor until he obtained the Coordinator position on or about June 12, 1991. On June 19, 1991, the CNTU therefore filed a grievance seeking the inclusion of the position of Operations Coordinator in its unit of office employees. The

matter was referred to arbitration.

At the beginning of February 1992, the arbitrator took the Corporation's request to suspend the arbitration proceeding under advisement. Subsequently, on February 10, the CNTU's union advisor informed the employer that the union was no longer asking that the position of Operations Coordinator be included in the CNTU's unit; however, it was asking that Mr. Masters' former duties as Pier Supervisor be returned to the bargaining unit.

The employer argued that the duties performed by the Operations Coordinator were those formerly performed by the Assistant Harbour Master/Terminal Supervision, until the incumbent of this position, Guy Charrier, decided to retire on December 20, 1991. Mr. Charrier's position, which was abolished on his retirement, was included in PSAC's unit under the certification order issued by the Board in March 1988.

The CNTU, for its part, stated that the duties performed by the Operations Coordinator were those of the Pier Supervisor, a position included in the office employee unit, and asked the Board to declare that these duties must be performed under the jurisdiction of the CNTU's collective agreement. It also asked the Board to refer the matter to the arbitrator so that he could dispose of the grievance before him.

The testimony heard by the Board concerning the main facts is not contradictory. Certainly, there were subtle differences in the positions taken by the parties and they sought different conclusions because of their differing interpretations of the facts. Nevertheless, the facts which the Board requires in order to decide this case are not disputed.

IV

The Harbour Master Office of the port of Montréal consists of two sections, the maritime section headed by Assistant Harbour Master Denis Montambault, and the shore division, headed by Assistant Harbour Master Richard Wildman, to whom reports the Operations Coordinator, Stephen Masters. Four fire prevention inspectors and two drivers report to Mr. Wildman. The drivers are included in the CNTU's blue-collar unit, while the inspectors belong to the CNTU's office employee unit. The Assistant Harbour Masters are represented by PSAC.

The employer's present organizational structure has been in place since the beginning of 1991. Prior to this, Operations consisted of four sections each headed by an Assistant Harbour Master, all of whom reported, as do the present Assistant Harbour Masters, to the Harbour Master. These sections were Maritime Traffic (D. Montambault); Fire Prevention (P. Loisel); Maritime Operations (J. St-Laurent) and Terminal Supervision (G. Charrier). The organization chart of October 28, 1985 shows that a cargo controller and two pier supervisors reported to G. Charrier in Terminal Supervision. The position of controller, however, was abolished in April 1990 following changes to the short-term lease systems involving the port's terminals. As for the pier supervisors, we will see later that, although Mr. Masters' name appears on this organization chart, he had left Operations in 1984 and did not return to this department until 1988. The second supervisor, Maurice Blanchard, was transferred to Railway Operations in 1986. None of these positions was filled subsequently.

The present structure was established by the Harbour Master during the strike by the CNTU, following his decision not to fill the positions left vacant by the retirement of two

Assistant Harbour Masters, G. Charrier and J. St-Laurent, in December 1990. Because Mr. Charrier no longer had any subordinates, the Harbour Master decided that it was no longer appropriate to replace him, but instead that there was a need to create the position of Operations Coordinator which would include all duties that Mr. Charrier used to perform, except for supervision which would be performed by Richard Wildman.

Thus, further to this decision by Harbour Master Bédard, Assistant Harbour Master Montambault assumed Mr. St-Laurent's duties, in addition to performing his own. Moreover, Mr. Wildman was assigned former Assistant Harbour Master Charrier's responsibilities for terminal supervision, while continuing to manage the fire prevention section. According to the uncontradicted testimony of Mr. Bédard, until his retirement, Mr. Charrier was responsible for the transportation of heavy lifts in the port, mixed terminals and container terminals, the operation of the passenger terminal, the management of the passenger terminal budget and the management of the leases involving the shed operators.

V

Mr. Blanchard described to us his work during the years that he was employed as a Pier Supervisor. He devoted 75% of his time to the daily inspection of the piers or sheds. During this inspection, he enforced By-law A-1, the National Harbours Board's Operating By-laws. For example, if cargo placed on Corporation property constituted an obstacle or impediment, he reported this situation to Mr. Charrier who had the cargo moved. He followed the same procedure in the case of cargo placed on a pier or on the floor of a shed when the weight exceeded the authorized limit. Mr. Blanchard brought to the attention of the port police

any contravention of the by-law on the operation of a vehicle on port property that he noted during his daily inspection. He also ensured that the safety nets were in place beneath the gangways and in the other required locations to prevent people or cargo from falling into the water. The latter duty applied to ships moored some place other than at the passenger terminal, the latter being the exclusive responsibility of Assistant Harbour Master Charrier.

Another of Mr. Blanchard's duties consisted in reporting to Mr. Charrier all apparent damage caused to port installations. He provided Mr. Charrier with daily oral reports on what he had noted during his inspections of the sheds and piers. He prepared, as required, work orders, and they were approved by Mr. Charrier. He had on occasion coordinated the transporting of heavy lifts on port property in Mr. Charrier's absence. However, he acknowledged that this was Mr. Charrier's exclusive responsibility.

Mr. Masters also testified in this case. He told the Board that, although he was designated Pier Supervisor effective September 1983 until he was appointed to the position of Operations Coordinator in June 1991, he had stopped performing the duties of Pier Supervisor in 1984. On a number of occasions between 1984 and 1989, he asked the successive Harbour Masters during that period to amend his job description so that it would reflect his actual duties. However, according to Mr. Masters, no action was taken on his request because of the administrative problems that such a request could entail.

From September 1983 to May 1984, Stephen Masters and Maurice Blanchard almost always worked together. Mr. Masters' main duties consisted in inspecting piers and fences and in ensuring that ships had been properly moored and that cargo

was stored in accordance with the Corporation's by-laws. After patrolling the port, he reported to his superior, G. Charrier, damage caused to port property.

The Corporation's organization manual describes the duties of the Pier Supervisor as follows:

"1. Enforces safety measures, in particular compliance with By-law A-1: Operating By-law of the National Harbours Board and By-law B-3: Wharfage Charges Tariff;

2. Supervises the unloading and storage of cargo in the sheds and on the piers; provides the necessary assistance to the shed and terminal operators in order to expedite the handling of cargo; serves as liaison between the terminal operators and the customs agents, particularly as regards the removal of cargo;

3. Maintains the sheds and piers by inspecting the space leased daily, preparing work orders, as required, and drafting brief plans to expedite the performance of urgent work;

4. Checks and reports all damage to Board property; participates in investigations of fires, accidents, etc."

(translation)

Mr. Masters testified that he stopped performing the duties of Pier Supervisor in May 1984. He was then transferred to the Maritime Operations Division and reported to Assistant Harbour Master St-Laurent. Mr. Masters' annual performance review reports for the years 1984 to 1988, written by his immediate superior, show that his responsibilities were modified. For example, he participated in the sounding program, coordinated the fender float service for passenger vessels or prepared water level statistics and performed other duties relating to maritime operations.

Mr. Masters returned to work in the Terminal Supervision Division, under the supervision of G. Charrier, in September 1988. The responsibilities assigned to him were not, however, those that he and Mr. Blanchard used to perform and that were contained in the job description for a Pier

Supervisor. His performance review report signed by Mr. Charrier and Mr. St-Laurent in September 1988 lists the objectives set for him for 1988 and 1989: learn the operation of the passenger terminal, the passenger embarkation and disembarkation procedure, immigration, customs and Agriculture Canada services; prepare plans for the safe and functional berthing of passenger vessels, including the calculation of fender float positions; learn the operations relating to supplying drinking water to vessels and to testing the quality of water. These were the duties that Mr. Masters performed until the strike was declared on April 27, 1990 and also upon the resumption of work on April 5, 1991.

Since his appointment in June 1991 to the position of Operations Coordinator, Mr. Masters continued doing the work he was doing when he was undergoing training with Assistant Harbour Master Charrier. His responsibilities are described below.

- Assumes responsibility for the passenger terminal: Mr. Masters is responsible for its maintenance, opening and operation during the navigation season, from May to November. This includes preparing work orders for the various crafts required. He must also study the plan of each passenger vessel that berths at the passenger terminal wharf, prepare the berthing plans so that vessels' doors and gangways coincide with passenger terminal installations. This work is normally done together with Mr. Montambault and the Port Traffic Officer, both of whom are covered by PSAC's collective agreement. He also ensures that the services required on the arrival of passengers are available, for example, the reception officer and the police. He also ensures that the passenger terminal space used by the customs officers meets their specific needs. The passenger terminal occupies the majority of his time during the

navigation season. He sometimes works there six or seven days a week.

- Coordinates the movement of heavy lifts and special equipment on port property and its access routes: to this end, he plans the route, has it widened and fences and posts removed, as required, and communicates with the police. There were only 6 or 7 such operations in 1988. Now there are some 50 a year.

- Ensures that shed operators comply with their leases in accordance with port by-laws.

- Is responsible for the maintenance and repairing of sheds and wharfs: Mr. Masters prepares the inspection surveys to identify damage before and after the expiry of the shed operators' leases. He prepares the work orders for damage repair work, as required.

- Manages the budget of the passenger terminal and the budgets of all the mixed and container terminals. Responsibility for administering the budgets of the terminals was recently delegated to the shore division in January 1992, by Mr. Wildman. The budgets of the terminals were previously managed by the Mechanical Maintenance Planners, members of PSAC.

- Performs general supervision over the handling and storage of cargo in the sheds. Serves as consultant to the importers and customs brokers. The time devoted to these duties, however, is a very small percentage of Mr. Master's total work time.

The evidence showed that the inspection and checking duties and the damage reports that used to be a Pier Supervisor responsibility have been performed, since the end of the

strike, by the Fire Prevention Inspectors who, in the course of their work, visit all areas of the port's property. The Fire Prevention Inspectors who report to Assistant Harbour Master Wildman, belong to the office employee unit (the CNTU).

VI

In order to deal with the present cases, the Board must determine whether the duties of the position in dispute are in the nature of the duties covered by the intended scope of the certificate issued to the CNTU or that issued to PSAC. A comparison of the positions represented by PSAC and those represented by the CNTU as of March 25, 1988, when the Board issued a certification certificate to PSAC and amended the certificate held by the CNTU, reveals that the Board had intended to include both the professional and technical employees in the same unit, whereas the intended scope of the certificate covering the non-professional office employees remained, for all practical purposes, unchanged. This, moreover, is clearly apparent from the certificates issued by the Board.

After reviewing the evidence and arguments of the parties on the duties performed by the incumbent of the position of Operations Coordinator, the Board finds that these duties are not part of the intended scope of the certification certificate held by the CNTU. When we compare the duties of the position of Operations Coordinator with those of the position of Pier Supervisor, represented by the CNTU, and those of the position of Assistant Harbour Master/Terminal Supervision, it seems clear to us that all the duties now being performed by the Operations Coordinator were previously performed by Assistant Harbour Master Charrier. The Coordinator administers the budgets of the terminals, a duty that Mr. Charrier did not carry out, although he had to

administer the budget of the passenger terminal. However, the evidence reveals that these budgets were managed by employees belonging to PSAC's unit until the end of December 1991. Mr. Masters prepares the berthing plans, but these plans are also prepared by the Assistant Harbour Master/Maritime Section and the Supervisor, Dredging and Floating Equipment, both members of PSAC's unit.

Much was made of the fact that the duties of the supervisor included, among others, the enforcement of safety measures, in particular the Operating By-law of the National Harbours Board and the application of Wharfage Charges Tariff By-law. This fact did not affect this Board's decision since the evidence reveals that a number of positions belonging to different bargaining units are responsible for enforcing these same by-laws.

The CNTU's representative is asking the Board to declare that the duties of the Coordinator are included in its bargaining unit. There is no doubt that most duties performed by the incumbent of the Coordinator position were also performed by the incumbent when he occupied the position of Pier Supervisor, a position included in the CNTU's office employee unit. However, these duties are not covered by the intended scope of the certification certificate of the CNTU. The fact that some employees belonging to a bargaining unit performed for a number of years duties that are not covered by a certification certificate does not exclude these employees from the scope of the appropriate certification certificate. The nature of these duties cannot be altered by the simple passage of time.

The evidence on file leads the Board to conclude that the duties of the Coordinator are of a technical nature. The Board is satisfied that the Coordinator replaced the

Assistant Harbour Master/Terminal Supervision in the duties that were delegated to him before he retired (except as regards supervision) and that the position of Operations Coordinator was correctly included in PSAC's unit by the employer. The evidence, moreover, shows that the Pier Supervisor's main activities between 1983 and 1986 consisted in inspecting the wharfs and sheds and then reporting his observations to his superior. It is clear that these duties are within the intended scope of the CNTU's certificate and that they continue, as is appropriate, to be performed by employees represented by the CNTU, namely, the Fire Prevention Inspectors.

VII

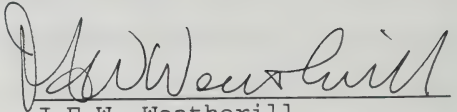
Conclusion

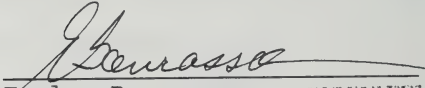
The Board declares that the work performed by the Operations Coordinator is covered by the intended scope of the certification certificate held by PSAC and that the incumbent of this position is therefore bound by PSAC's collective agreement.

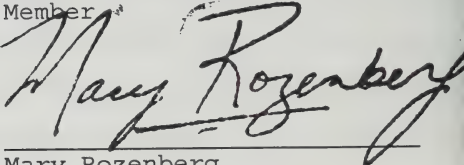
The Board will amend the certificate of the CNTU in order to add the position of Operations Coordinator to the list of exclusions on page 3 of the certificate, under "Harbour Master Office."

The Board refers the matter to the arbitrator so that he can settle the grievance before him in accordance with the Board's decision.

This is a unanimous decision.


J.F.W. Weatherill
Chairman


Evelyn Bourassa
Member


Mary Rozenberg
Member

ISSUED at Ottawa, this 5th day of May 1993.

CCRT/CLRB - 1008

Information

This is not an official document.
Only the Reasons for Decision can
be used for legal purposes.

Ce document n'est pas officiel.
Seuls les Motifs de décision
peuvent être utilisés à des fins
juridiques.

Summary

Harry Finley, complainant, and
International Brotherhood of
Electrical Workers, System Council
No. 33, respondent union.

Board Files: 745-4168
745-4290

Decision No.: 1009

Résumé

Harry Finley, plaignant, et la
Fraternité internationale des
ouvriers en électricité, conseil de
réseau n° 33, syndicat intimé.

Dossiers du Conseil: 745-4168
745-4290

Décision n° 1009

The Board found that System Council
No. 33 of the International
Brotherhood of Electrical Workers
(IBEW), and its general chairman,
violated section 37 of the Canada
Labour Code (Part I - Industrial
Relations) in its handling of
certain grievances filed by Harry
Finley against his employer, VIA
Rail Canada Inc. (VIA Rail), prior
to and following his dismissal in
early 1992.

Earlier, the Board had found, in
response to a separate complaint
made by Mr. Finley against VIA Rail
under Part II of the Code
(Occupational Safety and Health),
that VIA Rail had in fact dismissed
him for asserting his right to
refuse to work in a situation of
danger and that many of the
allegations made to justify the
dismissal were actually without
merit. The Board in Harry Finley
(1992), as yet unreported CLRB
decision no. 948, ordered VIA Rail
to reinstate Mr. Finley and to
compensate him for all lost wages.

In finding in these complaints that
the IBEW had breached its duty of
fair representation toward
Mr. Finley (as required in section
37 of the Code), the Board
concluded that the union had based
its handling of Mr. Finley's
grievances and its decision not to
take them to arbitration solely
upon the story related to it by VIA
Rail representatives and had failed
to investigate the matter or get
Mr. Finley's version.

Le Conseil a jugé que le conseil de
réseau n° 33 de la Fraternité
internationale des ouvriers en
électricité (le syndicat) et son
président général ont enfreint
l'article 37 du Code canadien du
travail (Partie I - Relations du
travail) lorsqu'ils ont traité
certains griefs déposés par Harry
Finley à l'égard de son employeur,
VIA Rail Canada Inc. (VIA Rail),
avant et après son congédiement au
début de 1992.

Dans une décision antérieure
concernant une plainte déposée par
M. Finley en vertu de la Partie II
du Code (Sécurité et santé au
travail), le Conseil avait conclu
que M. Finley avait été congédié
pour avoir exercé son droit de
refuser de travailler dans des
conditions dangereuses et que le
congédiement était de fait sans
fondement. Dans Harry Finley
(1992), décision du CCRT n° 948,
non encore rapportée, le Conseil a
ordonné à VIA Rail de réintégrer
M. Finley dans ses fonctions et de
l'indemniser pour toutes pertes
subies.

En jugeant en l'instance que le
syndicat avait manqué à son devoir
de représentation juste (prévu à
l'article 37 du Code), le Conseil a
conclu que le syndicat avait traité
les griefs de M. Finley et avait
décidé de ne pas les renvoyer à
l'arbitrage en se fondant
uniquement sur les faits qui lui
avaient été exposés par les
représentants de VIA Rail et qu'il
n'avait ni fait enquête ni obtenu
la version des faits de M. Finley.

What is unusual about this case is that the IBEW failed to be represented at a hearing in Winnipeg on February 2, 1993; the Board then directed the parties to make written submissions within certain time periods and gave notice that it would proceed to decide these complaints on the basis of the contents of these two files plus relevant facts set out in Harry Finley (948), supra. (The Board may do this under the provisions of section 98(2) of the Code, but never previously has it found without a public hearing that a party has violated section 37.)

The IBEW made written submissions, which were then taken into account by the Board in reaching this decision.

Since Mr. Finley had already been reinstated and had been compensated by VIA Rail for his lost wages, as per Harry Finley (948), supra, the Board determined that the only loss he had suffered as a result of the union's violation of the Code had been the expenses he incurred in engaging his own legal counsel and in pursuing his battle to regain his employment - expenses which the Board would have required the union to defray had it been necessary to order the grievances to arbitration. The Board ordered the union to pay these expenses and also the expenses of taking these section 37 complaints to the Board. The Board retained jurisdiction in the matter in the event that an alternative or additional remedy might be required by changed circumstances.

Chose inhabituelle, le syndicat n'était pas représenté à l'audience tenue à Winnipeg le 2 février 1993. Le Conseil a alors demandé aux parties de présenter des observations écrites dans un certain délai et les a avisées qu'il trancherait les plaintes en se fondant sur le contenu des deux dossiers et sur les faits pertinents énoncés dans Harry Finley (948), supra. (Le Conseil peut agir ainsi aux termes des dispositions du paragraphe 98(2) du Code, mais n'a jamais auparavant jugé qu'une partie avait enfreint l'article 37 sans tenir d'audience publique.)

Le syndicat a présenté des observations écrites, dont le Conseil a tenu compte en rendant sa décision.

Puisque M. Finley a été réintégré dans ses fonctions et qu'il a été indemnisé par VIA Rail pour perte de salaire (en conformité avec Harry Finley (948), supra), le Conseil estime que les pertes subies par M. Finley dans cette affaire se limiteraient aux honoraires de l'avocat chargé de représenter le plaignant en vue de sa réintégration - le Conseil aurait exigé que le syndicat paie ces frais s'il avait été jugé nécessaire d'ordonner le renvoi des griefs à l'arbitrage. Le Conseil a ordonné au syndicat de payer ces frais ainsi que les frais liés au dépôt des plaintes fondées sur l'article 37. Il se réserve le droit de s'occuper de l'affaire si, en raison de circonstances nouvelles, d'autres mesures de redressement s'avèrent nécessaires.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Harry Finley,
complainant,
and

International Brotherhood of
Electrical Workers, System
Council Number 33,
respondent union.

Board Files: 745-4168
745-4290

The Board was composed of Thomas M. Eberlee, Vice-Chairman,
and Ginette Gosselin and J. Jacques Alary, Members.

Appearances (on the record)

David L. Lewis and A.R. McGregor, Q.C., for Harry Finley;
and

Frank Klamph, System General Chairman, International
Brotherhood of Electrical Workers, System Council Number
33, for the respondent union.

These reasons for decision were written by
Mr. Thomas M. Eberlee, Vice-Chairman.

I

Harry Finley is an electrician employed by VIA Rail Canada
Inc. at its Winnipeg maintenance centre. Throughout
Mr. Finley's almost 20 years of employment, his record
remained totally clear. However, as a result of alleged
misbehaviour on July 25, 1991, August 20, 1991 and
September 9, 1991, he was punished by VIA Rail with a total
of 55 demerit points and a 14-day suspension without pay.
He appealed each of the separate punishments, and

grievances were filed on his behalf by the union at the regional level. VIA Rail rejected these grievances. They were referred to System General Chairman Frank Klamph to be dealt with at the third level of the grievance procedure.

It was important to Mr. Finley that the punishment be challenged. With an accumulation of 55 demerits, he stood only five points away from outright dismissal.

Without talking to Mr. Finley to get his side of the story, System General Chairman Klamph struck a deal with VIA Rail's then manager of labour relations to have the number of demerit points reduced from 55 to 45, with the 14-day suspension remaining.

Within the requisite 90 days of being notified of this outcome by the Regional General Chairman of the union, John Honer, Mr. Finley complained to the Board (on February 17, 1992 in file 745-4168) that this handling of his case by the union's System General Chairman constituted a violation of section 37 of the Canada Labour Code (Part I - Industrial Relations). He stated in his complaint that he felt the grievances should have gone to arbitration instead of being settled on this basis.

Section 37 of the Code reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

By the time he filed this complaint, however, Mr. Finley had been found guilty by VIA Rail of another alleged

employment misdemeanour on January 26, 1992, had been assessed another 40 demerit points and had been fired on February 10, 1992 for having accumulated more than 60 points. A grievance was filed; it, too, found its way to Mr. Klamph at the third level of the process. He took it up with VIA Rail's general manager of labour relations, K.A. Pride, who provided him with all of VIA Rail's documentation on the incident and maintained the position that the discharge was warranted.

At a meeting of the Executive Board of System Council Number 33 on April 25 and 26, 1992, the union decided not to send the matter to arbitration "as we did not feel we would win before an arbitrator, given all the documents before us", according to a letter to the Board from Mr. Klamph, dated July 15, 1992.

II

Meanwhile, on March 27, 1992, Mr. Finley took another approach to his troubles with VIA Rail. He filed a complaint with the Board alleging that his treatment by VIA and his ultimate dismissal occurred because he had exercised his right under Part II of the Code to refuse to work in an unsafe situation. (Board file 950-231)

The Board set aside the section 37 complaint against the union in file 745-4168 and focused initially on the Part II complaint in file 950-231. A hearing was scheduled for early May. Mr. Finley then engaged legal counsel and the latter asked the Board to postpone the hearing in order to allow him to make adequate preparation to present the case. The hearing took place in Winnipeg on July 7, 8 and 9, 1992.

The Board consisted of Vice-Chairman Thomas M. Eberlee, sitting as a single member pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health). In Harry Finley (1992), as yet unreported CLRB decision no. 948, issued on July 21, 1992, the Board agreed with Mr. Finley and ordered VIA Rail to rescind all demerit marks, expunge from his record all references to the incidents which produced the marks, compensate him for all lost time and reinstate him in his employment.

VIA Rail challenged this decision by filing for its review in the Federal Court of Appeal and by asking the Board for reconsideration under the Board's own review procedures. So far as this panel is aware, the application for Federal Court of Appeal review has not been disposed of; however, a reconsideration panel of the Board found no merit in, and dismissed, VIA's review application.

III

Prior to the hearing of the Part II complaint and the issuance of decision no. 948, counsel for Mr. Finley filed a further complaint (file 745-4290), on June 30, 1992, alleging that the IBEW had violated section 37 in respect of its handling of Mr. Finley's final grievance against his termination of employment on February 10, 1992. This complaint sought an order requiring the union to take and carry on the grievance to arbitration, if necessary.

However, as has already been indicated, Mr. Finley's reinstatement in employment and compensation for lost wages was effected by means of decision no. 948 - at least in the event that decision no. 948 is allowed by the Federal Court of Appeal to stand.

The question of the quantum of Mr. Finley's compensation was not resolved until late November or early December 1992. However, on November 24, 1992, Mr. Finley asked through his counsel that the Board schedule a hearing in the two duty of fair representation complaints against the union (files 745-4168 and 745-4290). Notice of this request was conveyed to Mr. Klamph on or about December 1, 1992.

The Board was faced with a somewhat unusual situation: it had before it two complaints alleging violations by the IBEW of section 37 of the Code, yet much of what Mr. Finley sought in terms of reinstatement, etc. had been accomplished through decision no. 948. The Code says in section 98(1) that where a section 37 complaint is not settled, the Board shall hear and determine it. The Board thus cannot simply ignore such a complaint; it must respond to it, in the final analysis, by hearing it and determining it. This does not mean that the hearing process must be a public one; section 98(2) does give the Board the discretion to dispense with a "public hearing" if, "in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part." What this usually means in practice is that where the Board comes to such an opinion, the hearing and determination mentioned in 98(1) are carried out on the basis of the written submissions of the parties, which are deemed to be sufficient to give the Board the factual picture required to deal appropriately with the matter.

The Board's utilization of its discretion not to hold a public hearing has almost invariably occurred where the factual picture which emerges clearly from the written submissions of the parties shows that the section 37

complaint is without merit, either because it is untimely or because there simply is no evidence of discrimination, arbitrariness or bad faith to give prima facie support to the complaint. Normally, where the submissions suggest the possibility that the complaint may have merit, the Board schedules a hearing, although there is no particular reason why it ought to do so.

In this instance, as has been noted earlier, the Board had a somewhat unusual situation on its hands. Notwithstanding the fact that Mr. Finley was back at work following the application of other sections of the Code - although his ongoing prospects depend upon the outcome of VIA Rail's case before the Federal Court of Appeal, according to VIA Rail's own counsel in correspondence received by the Board - he still had claims against the union which had not been extinguished by these Part II proceedings and he was unwilling to drop them.

Under the circumstances, and because the factual picture emerging clearly from the written submissions in files 745-4168 and 745-4290 did not support the dismissal of these complaints on the basis of a section 98(2) procedure, the Board decided that its wisest course would be to schedule a public hearing.

The parties were therefore notified in letters dated December 16, 1992 that a hearing would be held in Winnipeg on February 2 and 3, 1993. Mr. Klamph has acknowledged that he received this notice on December 18, 1992.

On January 22, 1993, Mr. Klamph wrote to the Board asking either that the Board not hear these matters at all because they had already been the subject of decision no. 948 -

which, according to Mr. Klamph, found VIA Rail "guilty" and "tells all" - or that the Board postpone the hearing so as to give him time to "study three Board files in addition to my own and proceed to obtain the services of a lawyer to defend myself and the Union inasmuch as Mr. Finley is represented by legal counsel in these cases".

Mr. Klamph went on to say: "We believe that Mr. Finley's allegations are without merit and we respectfully request that the Board cancel these hearings as the Board has already made their decision when it found Via [sic] Rail guilty."

The Board was unimpressed with Mr. Klamph's submission. In the first place, as has been indicated earlier, the Board was of the opinion that there was no basis in the written submissions of the parties in the two files - Mr. Finley's submissions and Mr. Klamph's on behalf of the IBEW - for concluding that the IBEW had not breached section 37, despite the disposition of the Part II complaint against VIA Rail. In the second place, it seemed wise to give the parties an opportunity to be heard in person. In the third place, Mr. Klamph had been given ample notice. In the fourth place, he had had more than sufficient notice that Mr. Finley was represented by counsel and thus more than sufficient time to engage his own counsel. For it was brought to his attention at least as early as June 30, 1992, when Mr. Finley's second complaint was filed, that Mr. Finley had counsel; he must also have been reminded of this fact around December 1, 1992 when Mr. Finley's counsel asked the Board to schedule hearings in the two files.

The Board advised Mr. Klamph that the hearing would proceed as scheduled. Mr. Klamph wrote further to the Board on

January 28, 1993 reiterating his appeal for cancellation or postponement of the hearing. He stated that if the hearing proceeded, notwithstanding his request, he would not be able to attend and "thus there will be a denial of procedural fairness and of natural justice and let the record so show".

Mr. Klamph did not attend the hearing in person, nor was he represented in any way.

After the hearing, the following letter (Harry Finley, February 8, 1993 (LD no. 1114) was sent to Mr. Klamph and the other parties:

"A quorum of the Canada Labour Relations Board consisting of Vice-Chairman Thomas M. Eberlee and Members Ginette Gosselin and Jacques Alary convened a hearing in Winnipeg on February 2, 1993 into Mr. Finley's complaints alleging violations of section 37 of the Canada Labour Code (Part I - Industrial Relations) by the International Brotherhood of Electrical Workers.

At the outset of the hearing, the Board noted that the respondent union was not represented at the hearing. The Board pointed out that the parties had been notified in letters dated December 16, 1992 that the hearing would take place on February 2 and 3, 1993. The Board also noted that in a letter to the Chairman of the Board, dated January 28, 1993, the I.B.E.W. System General Chairman acknowledged that he had received notice of the hearing on December 18, 1992. In an earlier letter, dated January 22, 1993, the System General Chairman asked the Board to postpone the hearing, but the Board decided after obtaining representations from the complainant and carefully considering the request, that the hearing would proceed as scheduled on February 2 and 3. This decision was communicated to the System General Chairman in a letter from the Board dated January 28, 1993.

Also at the outset of the hearing, the Board explained that under section 98(2) of the Code it is not obliged to hold a public hearing in respect of an alleged contravention of section 37. When pursuant to section 98(2) no public hearing is held, the Board proceeds to determine the complaint on the basis of the information in the file, including the report of the

investigating officer. Moreover, as mentioned in the notice of hearing as per section 20(2) of the Canada Labour Relations Board Regulations, when a person who is notified of a hearing does not appear, the Board may proceed and dispose of the matter in the absence of that person.

The Board advised those in attendance at the hearing that, in light of the absence of the respondent union, it would now proceed to decide the instant matters on the basis of the contents of the two files plus relevant facts set out in Board Decision no. 948. The Board advised that notice of the foregoing would be given in writing to the respondent union.

The complainant was asked what remedy he sought in respect of these two complaints. His counsel addressed the Board at length on this matter. It was argued that if the Board found there to be a violation of section 37 in one or both of these files, the Board's usual remedy of ordering that the grievance or grievances be arbitrated was pointless under the circumstances since Board Decision no. 948 had already put Mr. Finley back to work with compensation for lost wages. Counsel pointed out that the Board also usually prescribes, in addition to arbitration, a remedy which includes the payment by the respondent union of the legal fees for counsel selected by the complainant to support him or her at arbitration. In this instance, Mr. Finley, at his own expense, brought his dismissal (in which the union had acquiesced) to the Board under Part II of the Code and succeeded in having it over-turned. As a remedy for the union's failure under section 37 to represent him, so the argument went, his reasonable legal costs incurred in winning reinstatement should be reimbursed to him by the union, as well as his costs of pursuing his section 37 complaints. It was also suggested to the Board that the leadership of the union has displayed a pattern of representation of members of its bargaining unit which runs counter to section 37 and that the Board should order this to cease.

The Board heard testimony under oath from John Honer, regional general chairman of the IBEW, and from Murray Wakeman, local chairman of local 409 of the IBEW. For the purposes of making a determination at this stage, pursuant to section 98(2), the Board considers that the only possibly relevant point emerging from this testimony was Mr. Honer's challenge to the claim by the IBEW System General Chairman on page 3 of a letter to the Board dated February 25, 1992:

'Before meeting with Mr. Pride, I discussed this case with the General Chairmen of our Council and the decision was that I use my best efforts in mitigating the discipline assessed Mr. Finley.'

Mr. Honer told the Board that he had referred the case to the System General Chairman for discussion with the employer at the third level of the grievance procedure and had recommended that the grievance go to arbitration, but he had no prior discussion about it with the System General Chairman as the latter had claimed in his written submission.

This letter will serve to give formal notice to the parties of the Board's intentions as set out herein. The Board will receive and entertain any further written submission which the respondent union may wish to make. Such submission must be in the Board's hands within two weeks of the date of this letter. The complainant may reply to that submission. The reply must be in the Board's hands within a further two weeks. The Board will then proceed to dispose of these files."

IV

The Board has received submissions from Mr. Klamph and from counsel for the complainant. The Board has decided that it will exercise the discretion conferred on it by section 98(2) and will not reconvene to hold a further public hearing in these matters. It is to be noted that no party, in submissions made in response to Harry Finley (LD no. 1114), supra, has asked for further proceedings to be by way of public hearing. The Board considers that it is now in a position to determine these complaints.

The Board has given notice that it will take into account relevant facts set out in Harry Finley (948), supra. There is no need to incorporate the whole of that decision into these reasons. For the purposes of this decision, the following facts from that decision will be highlighted:

- "The evidence shows that early in 1991, he [Mr. Finley] became concerned about safety issues and especially about the possibility of locomotives and cars being moved while he and his fellows were working on maintenance and repairs underneath and around them

..." (page 2)

- ".... the Board finds that Mr. Finley did state that he intended to refuse to work if the circumstances were not changed." (page 3)
- the circumstances were changed and no further action under Part II of the Code was required at that time; however, that and subsequent expressions of safety concerns by him led to his being perceived as a "safety nuisance". (pages 5 and 6)
- Mr. Finley made written reports concerning incidents that he considered to be unsafe or potentially unsafe and named supervisors whom he believed were responsible for allowing unsafe situations to occur; (page 6)
- the Board inferred from material filed by VIA Rail that these supervisors were embarrassed and annoyed by Mr. Finley's reports; (page 6)
- Mr. Finley had had a clean record for almost 20 years, but in late July the supervisors began to supervise him very closely; (pages 2 and 7)
- Mr. Finley was accused of being intoxicated on the job on July 25, 1991; the Board concluded that there was an "absence of convincing evidence that the intoxication was real" and that the penalty of 30 demerit points assessed against him was deserved; (pages 8 and 10)
- Mr. Finley was assessed a further 15 demerit marks for

another alleged incident; the evidence presented to the Board prompted the Board to doubt VIA Rail's account; (pages 9 and 10)

- both of the foregoing punishments were meted out after Mr. Finley had refused to work pursuant to section 128 of the Code, in a situation which he considered unsafe; at the time, a Labour Canada safety officer confirmed Mr. Finley's work refusal and found that a dangerous condition did exist; (pages 9 and 10)
- "The Board believes, on a balance of probabilities, that the findings against Mr. Finley and the severity of the punishment were, in large part, directly attributable to his having been so assiduous in pressing his safety concerns. ..." (page 10)
- another alleged incident occurred on September 26, 1991, which "earned Mr. Finley 10 demerits and 14 days of suspension; the Board concluded that "this episode was simply something cooked up by supervisors in their continuing effort to get rid of Mr. Finley..." (page 12)
- at this stage, Mr. Klamph and Mr. Pride met and Mr. Klamph in effect accepted VIA Rail's allegations about Mr. Finley but there was an agreement to reduce his accumulation of penalties (for largely spurious charges, as it has turned out) from 55 demerits to 45, but to retain the 14 days of suspension; (page 12)
- an incident on January 26, 1992 that brought Mr. Finley a final 40 demerits and precipitated his dismissal "may have had some validity, but the affair

was greatly exaggerated" by VIA Rail, (page 13)

- the punishments meted out to Mr. Finley, which added up to dismissal, were "either excessive or outrageous"; the alleged incident of September 26, 1991 was "phony"; (page 14).

The evidence before the Board is that at no time did Mr. Klamph discuss any of this with Mr. Finley to get his side of the story. Mr. Klamph asserted in a letter to the Board, dated February 25, 1992, that before settling the grievances relating to the 55 demerits and the suspension on the basis of a reduction to 45 demerits plus the suspension, he had discussed the case with the general chairmen of their system council and it had been agreed that he would "use my best efforts in mitigating the discipline assessed against Mr. Finley". The evidence shows that he did not have any such discussion with John Honer, the regional general chairman who knew most, if not all, about the matter.

In that same letter, Mr. Klamph told the Board that "the decision not to proceed to arbitration with Mr. Finley's grievance [sic] is based on jurisprudence in similar cases and we felt it could not be won before an arbitrator due to the lack of supporting evidence".

In a letter dated July 15, 1992, responding to Mr. Finley's second complaint against the union in file 745-4290, Mr. Klamph stated that the Executive Board of System Council Number 33 had voted against proceeding further with Mr. Finley's grievance against the final 40 demerits and the dismissal "as we did not feel we would win before an arbitrator, given all of the documents before us". These

must have been VIA Rail documents, for there are few, if any, non-VIA documents in the files.

The evidence before the Board shows that Mr. Klamph and his colleagues who joined him in deciding not to proceed with Mr. Finley's various grievances considered and believed only VIA Rail's side of the story (which the Board found in Decision no. 948 to be highly questionable, to say the least). When he struck a deal with the VIA Rail manager of labour relations, Mr. Klamph relied almost exclusively on the VIA Rail story. While there were supporters of Mr. Finley present at the Executive Board meeting on April 25 and 26 and they pressed his case, it is apparent that Mr. Klamph and certain of his colleagues refused to consider the possibility that VIA Rail's allegations were wrong, or at the very least highly suspect. The fact is that had Mr. Klamph and these colleagues done even a modicum of investigation and research - had they even had the common sense to touch base with Mr. Finley himself - they would inevitably have had doubts about what VIA Rail had done to Mr. Finley and would not have abandoned him to seek redress by himself.

The fact is that the handling of Mr. Finley's grievances by the union's leadership was so perfunctory as to have been arbitrary and to have placed the union in the position of having violated section 37 of the Code. The union failed in its duty of fair representation to Mr. Finley. The Board finds that both of Mr. Finley's complaints have merit and that the union thus breached section 37.

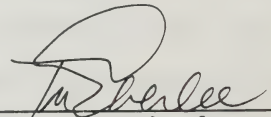
It is usual where a determination of this kind is made, for the Board to order among other things:

- that the grievance or grievances be referred to arbitration forthwith and that any time limits which might have the effect of hindering such a referral be waived;
- that the complainant be entitled to engage counsel of his or her choice to carry the grievance or grievances to arbitration and through the arbitration process;
- that the reasonable fees, costs and expenses of such counsel be paid by the respondent union; and
- that there be an appropriate division between the employer and the respondent union of any liability for payment of lost wages.

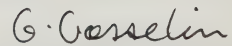
Since Mr. Finley has already gone back to work and been compensated by VIA Rail for lost wages as a result of VIA's implementation of the Board's orders in Decision no. 948, the situation is somewhat different from the usual. The Board considers, however, that the respondent union, having breached section 37 and having provided no representation to Mr. Finley - in short, having left him entirely in the position of being forced to defend himself with his own personal resources - should now contribute money toward the cost of that defence - as it would have had to do were the grievances being ordered to arbitration. Further, there are certain other principles that should be enunciated at this point, in the event that other remedial measures are required: the union should contribute toward Mr. Finley's cost of any defence he may be obliged to mount in respect of VIA Rail's Federal Court of Appeal challenge of his reinstatement in employment. Moreover, in the event that for some reason his reinstatement and/or compensation under

the provisions of Part II of the Code should be overturned, then the Board's customary remedy of ordering the grievances to arbitration and so forth may need to be applied as an alternative.

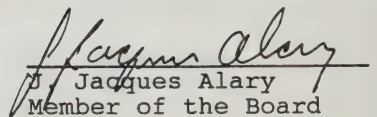
For the present, the Board orders the respondent union to pay to Mr. Finley a sum of money equivalent to the reasonable expenses incurred by him in engaging counsel to pursue his complaint before the Board in file 950-231 and his complaints in files 745-4168 and 745-4290. The Board will retain jurisdiction to deal with any question that may arise in connection with the implementation of this order. It will also retain jurisdiction in the event that an alternative or additional remedy, as alluded to earlier, may be required by changed circumstances. Should such a proposed remedy have a potential impact upon the employer, the Board will, of course, invite submissions in advance of taking any further step.



Thomas M. Eberlee
Vice-Chairman



Ginette Gosselin
Member of the Board



J. Jacques Alary
Member of the Board

ISSUED at Ottawa, this 30th day of April 1993.

CLRB/CCRT - 1009

information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

SUMMARY

Giant Mines Employees Association, applicant, Royal Oak Mines Inc., employer, Canadian Association of Smelter and Allied Workers, Local No. 4, certified bargaining agent.

Board File: 555-3528

Decision no.: 1010

Application for certification pursuant to section 24(3) of the Code by an independent association seeking to displace the incumbent Canadian Association of Smelter and Allied Workers, Local No. 4, as bargaining agent for a unit of employees of Royal Oak Mines Inc. Application dismissed for lack of majority support.

The incumbent trade union opposed the application, alleging that the applicant was employer dominated to the extent that its fitness to represent employees in collective bargaining was impaired. The Board, upon a consideration of all of the evidence on that point, found that employer domination within the meaning of the Code had not been established.

RÉSUMÉ

Giant Mines Employees Association, requérante, Royal Oak Mines Inc., employeur, et Association canadienne des travailleurs de fonderie et ouvriers assimilés, section locale n° 4, syndicat accrédité.

Dossier du Conseil: 555-3528

Décision n°: 1010

Demande d'accréditation présentée en vertu du paragraphe 24(3) du Code par une association indépendante qui cherchait à remplacer l'Association canadienne des travailleurs de fonderie et ouvriers assimilés, section locale n° 4, à titre d'agent négociateur d'une unité d'employés de Royal Oak Mines Inc. La demande est rejetée parce que l'Association n'a pas l'appui de la majorité.

Le syndicat accrédité s'oppose à la demande puisqu'il allègue que la requérante est dominée par l'employeur au point que son aptitude à représenter les employés dans le cadre des négociations collectives est compromise. Le Conseil, après avoir examiné toute la preuve à ce sujet, a conclu qu'une telle domination au sens du Code ne pouvait être établie.



The Board found that the applicant was a trade union within the meaning of the Code, and determined that the unit of employees appropriate for collective bargaining was the unit described in the certificate held by the incumbent union, that is, an "all-employee" unit of the industrial type, with certain specific exceptions. There was no significant issue as to the description of the bargaining unit.

For the purpose of determining whether or not a majority of the employees in the bargaining unit wished to have the applicant trade union represent them as their bargaining agent, the Board compared the membership evidence submitted by the applicant to the total number of persons coming within the bargaining unit as determined by it. This number included persons who had been hired by the employer after the commencement of a legal strike or lockout, as replacements for employees on strike. Both striking employees and replacement workers are in an employment relationship with the employer, and are covered by the description of the bargaining unit.

The Board considered the policy of excluding replacement workers from participation in the determination of representation questions, and concluded (1) that such a policy is embodied in sections 24(3) and 38(5) of the Code, and that the present application is

Le Conseil conclut que la requérante est un syndicat au sens du Code et que la description de l'unité habile à négocier collectivement correspond à celle du certificat que détient le syndicat accrédité, soit une unité composée de «tous les employés» de type industriel, sauf quelques exceptions. La description de l'unité de négociation n'a pas fait l'objet de graves objections.

Pour déterminer si la majorité des employés de l'unité désiraient que la requérante les représente à titre d'agent négociateur, le Conseil a comparé les preuves d'adhésion syndicale soumises par l'Association au nombre total de personnes membres de l'unité de négociation qu'il avait lui-même définie. Les personnes embauchées par l'employeur après le début d'une grève légale ou d'un lock-out en vue de remplacer les employés en grève ont été comptées dans ce total. Les employés en grève et les personnes qui les remplacent entretiennent des relations d'emploi avec l'employeur, et les deux groupes font partie de l'unité de négociation.

Le Conseil s'est penché sur la politique qui consiste à exclure les personnes qui remplacent des employés en grève de toute mesure visant à établir le caractère représentatif et il en est arrivé aux conclusions suivantes: (1) cette politique tombe

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

not prohibited under those provisions; (2) that there is no justification in law for the Board to erect its own policy going beyond that set out in the Code; to do so would result in the indefinite suspension of certain employees' rights to collective bargaining, contrary to one of the fundamental goals of the Code; (3) that protection of striking employees' seniority rights is established through the appropriate application of the unfair labour practice provisions of the Code; replacement workers are, in general, subordinate to striking employees in this regard.

Further, the Board considered that employees who had been discharged and whose employment status was subject either to pending arbitration or to unfair labour practice proceedings before the Board had an appropriate and sufficient interest in the selection or continuation of a bargaining agent, and were to be treated as employees for the purpose of determining the representative character of the applicant.

Comparing the evidence of membership submitted by the applicant to the membership of the bargaining unit determined to be appropriate, the Board found that the applicant had not established majority support, and dismissed the application.

sous l'empire des paragraphes 24(3) et 38(5) du Code et ces dispositions ne s'appliquent pas à la présente demande; (2) le Conseil ne peut légitimement énoncer une politique dont l'ampleur dépasserait celle des dispositions du Code; de telles mesures entraîneraient la suspension des droits de certains employés à la négociation collective, ce qui contreviendrait à l'un des objectifs fondamentaux du Code; (3) les droits d'ancienneté des employés en grève sont protégés par les dispositions du Code concernant les pratiques déloyales et les personnes qui remplacent des employés en grève sont «subordonnées» en ce sens aux employés en grève.

Par ailleurs, le Conseil estime que les employés qui ont été congédiés et dont le statut d'emploi doit être résolu par l'arbitrage ou le règlement de plaintes de pratiques déloyales dont le Conseil est saisi avaient suffisamment d'intérêt pour le choix d'un agent négociateur, ou le maintien de ce statut, et qu'ils devraient être considérés comme des employés aux fins de la détermination du caractère représentatif.

Après avoir comparé les preuves d'adhésion syndicale présentées par la requérante relativement à l'appui dont elle jouissait au sein de l'unité de négociation jugée habile à négocier, le Conseil a conclu que la requérante n'avait pas l'appui de la majorité et il a rejeté la demande.

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Giant Mines Employees
Association,

applicant,

and

Royal Oak Mines Inc.,

employer,

and

Canadian Association of
Smelter and Allied Workers,
Local No. 4,

certified bargaining agent.

Board File: 555-3528

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
and Mr. Michael Eayrs and Ms. Mary Rozenberg, Members.

A hearing in this matter was held at Yellowknife, N.W.T., on
March 9, 10 and 11, 1993.

Appearances

Mr. Israel Chafetz and Mr. Jim O'Neil, for the applicant;
Mr. Bill Heath, for the employer; and
Mr. Leo McGrady, Ms. Gina Fiorillo and Mr. Harry Seeton, for
the certified bargaining agent.

These reasons for decision were prepared by Mr. J.F.W.
Weatherill, Chairman.

This is an application for certification filed with the
Board pursuant to section 24 of the Canada Labour Code (Part
I - Industrial Relations) on January 13, 1993.

The material provisions of section 24 of the Code are as
follows:

*"24.(1) A trade union seeking to be certified as
the bargaining agent for a unit that the trade
union considers constitutes a unit appropriate*

for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit.

(2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

...

(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;

...

(3) An application for certification under subsection (2) in respect of a unit shall not, except with the consent of the Board, be made during the first six months of a strike or lockout of employees in the unit that is not prohibited by this Part."

The present application is properly before the Board. Having studied the constitution and by-laws of the applicant, Giant Mines Employees Association, the Board finds that it is a trade union within the meaning of the Code. No collective agreement is in force, but the incumbent trade union, the Canadian Association of Smelter and Allied Workers, Local No. 4 (CASAW), has been certified under Part I of the Code. Such certification occurred more than 12 months prior to the filing of this application.

There is a legal strike or lockout of employees in the unit in effect (the employer alleges that employees went on strike; the incumbent union alleges that employees were locked out), but that strike or lockout began more than six months prior to the filing of this application. This application has been made in accordance with the Board's Regulations. None of the foregoing has been the subject of any serious dispute in these proceedings. Accordingly, and having regard to the provisions of section 24 of the Code

set out above, we conclude that the application is properly before us.

The incumbent trade union, CASAW, has alleged that the applicant is "employer-dominated" within the meaning of section 25(1) of the Code, and that its certification would be prohibited by that section. Considerable evidence in this respect was led at the hearing of this matter. Section 25(1) of the Code provides as follows:

"25.(1) Notwithstanding anything in this Part, where the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired, the Board shall not certify the trade union as the bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that applies to any such employees shall be deemed not to be a collective agreement for the purposes of this Part."

Having regard to all of the evidence, we do not consider that it has been established that the applicant trade union is "dominated or influenced" within the meaning of section 25(1) of the Code. There can be little doubt that the employer, whose relationship with the incumbent trade union has become an extremely bad and embittered one, welcomed the arrival of a potential replacement on the scene. It did not discourage the organizing activities of the applicant in any vigorous way. One item of evidence in particular, the "discovery" of a copy of an employee list, is particularly suspicious, although there is no direct evidence to link that to deliberate action by the company. It is quite possible that the list was left for discovery by an office employee, not a member of management, who was sympathetic to the applicant. We note, for example, that there was evidence of various documents turning up mysteriously at the office of the incumbent union, although those actions could

scarcely be attributed to any deliberate action by management.

Given the state of all the evidence on this aspect of the case, we do not consider the applicant to be the creature of the employer, and in any event there is not sufficient evidence to establish that the applicant, if "dominated" to any significant extent at all, is "so dominated or influenced" by the employer that its fitness to represent employees for the purpose of collective bargaining is impaired. It may well be that under the legislation in effect in most provinces, the application would, on the evidence before us, be dismissed on the ground of employer domination or influence. However, under the provisions of the Canada Labour Code, the respondent union has not proved that such domination or influence exists. This objection to the application is accordingly dismissed.

What must next be determined is the unit appropriate for collective bargaining. The applicant seeks to represent a unit consisting of "Hourly paid employees of Royal Oak Mines Inc. Yellowknife Division - Yellowknife NT". The bargaining unit set out in the collective agreement formerly in effect between the employer (as successor to Giant Yellowknife Mines Limited) and CASAW is determined by reading sections 2.01 and 1.01 of the agreement together. Those sections are as follows:

"2.01 The Company recognizes the Union as the exclusive bargaining agency for all employees covered by this agreement for the purpose of conducting collective bargaining regarding the rates of pay, hours of work and other working conditions and will continue to do so for the life of this Agreement so long as the Union retains its right to conduct collective bargaining on behalf of such employees under the law.

1.01 The term 'employee' or 'employees' as used in this Agreement, means all employees of the

Company at the Company's property at Yellowknife, Northwest Territories, except managerial, supervisory, technical and certain other specific personnel described and excluded by the Order of the Canada Labour Relations Board issued on the 11th day of April, A.D. 1986."

In fact, the Board order referred to in the collective agreement was superseded by an order dated December 9, 1991 (issued following an application by CASAW for a declaration pursuant to sections 44 and 45 of the Code), in which the bargaining unit is described (as it had been in 1986) as follows:

"All employees of Royal Oak Mines Inc. at its property in Yellowknife, N.W.T., employed in the Mine and Open Pit, Mill, Mechanical, Electrical, and Construction Departments and in the Warehouse, excluding shift boss and those above, survey party employees and those above in the Mine and Open Pit Department; chief assayer, assistant chief assayer, metallurgist, junior metallurgist, environment technician, refiner, mill shift boss and those above in the Mill Department; geologists in the Geology Department, foremen and those above in the Mechanical, Electrical and Construction Departments; chief warehousemen and those above in the Warehouse; and all office, clerical, computer, safety and personnel employees."

The bargaining unit just described is that for which CASAW currently holds bargaining rights and it is, essentially, the same as the unit for which the applicant applies. In any event, that is the unit which the Board considers to be appropriate for collective bargaining, and it is within the membership of that unit that the applicant must establish majority status if it is to displace the incumbent as bargaining agent for those employees.

Section 28(c) of the Code applies generally to applications for certification. That section provides as follows:

"28. Where the Board

...

(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."

In cases of contested raid applications such as this, however, the Board would normally order a vote of employees in the bargaining unit, that is, a vote between the applicant union and the incumbent union. Such a vote would be ordered pursuant to section 29(1) of the Code, which is as follows:

"29.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."

Although the Board has said that "special circumstances may arise in which it may be necessary for us to order a vote under section 127(1) [now section 29(1)] in a case where the applicant union does not have a majority when it files its application for certification" (Bell Canada (1979), 30 di 112; and [1979] 2 Can LRBR 435 (CLRB no. 192), at pages 117; and 440), the Board's regular policy in raid situations has been to require that a raiding union show majority representation in the bargaining unit before a vote will be ordered. It may be noted that section 29(2) of the Code, which requires that a vote be held in cases where an applicant union has established between 35 and 50% membership in the bargaining unit, does not apply in cases where, as here, there is an incumbent bargaining agent. The Board will, then, order a vote in this matter only if the applicant can show that it represents a majority of the employees in the bargaining unit.

In order to determine whether or not the applicant represents a majority of the employees in the bargaining unit, it is necessary first to determine who are the members of the bargaining unit, and then to consider the membership evidence in relation to those persons. The bargaining unit, as set out above, is "all employees ... in the Mine and Open Pit, Mill, Mechanical, Electrical, and Construction Departments and in the Warehouse", with certain exceptions. The parties take very different positions with respect to establishing the list of persons who come within this definition.

The applicant's position is that the list should consist of all persons who were "employees ... in the Mine ... etc.", as of January 13, 1993, the date of the application. That would be in accordance with section 28 of the Code, and with the Board's usual practice in certification cases. It is important to note that a list of employees as of the date of the application would include the names of employees on strike; they of course continued to be employees, unless the employment relationship had been severed for some reason other than their participation in the strike. Section 3(2) of the Code makes that clear:

"3.(2) No person ceases to be an employee within the meaning of this Part by reason only of his ceasing to work as the result of a lockout or strike or by reason only of his dismissal contrary to this Part."

The incumbent trade union, CASAW, takes the position that the list of employees in the bargaining unit (that is, the list of employees who would be eligible to vote) should consist only of those persons who were employed as of May 22, 1992, the day preceding the strike or lockout. Most of the employees actually working at the time of the application would be excluded from the voters' list on this

basis, although a number of persons employed at the time the strike began have since returned to work, and these persons would be entitled to vote.

This second position, that only persons employed at the time a strike or lockout began are entitled to vote on the issue of union representation, appears to be based on the view that the bargaining agent in such a case represents only the particular employees on whose behalf it was bargaining when the strike or lockout began, although the argument is not always put in those terms. In any event, it should be clear, at least with respect to applications under the Canada Labour Code, that the argument is not valid.

Under section 36(1) of the Code, a certified trade union has "exclusive authority to bargain collectively on behalf of the employees in the bargaining unit." This means all employees in the unit, and it means the unit as determined by the Board, for as long as it continues to exist. The bargaining unit continues to exist during the course of a strike. We are aware that a different view was expressed in Bird Machine Co. of Canada (1990), 91 CLLC 16,049 (Sask. L.R.B.), at page 14,501, where the Saskatchewan Board stated: "When a strike is declared and members of the bargaining unit walk out, the appropriate functional unit 'walks out' with them. ..." The meaning of the term "functional" in this context is ambiguous, and it is not at all clear in what sense a bargaining unit - as such - can be said to "walk out".

In any event, there is no provision in the Canada Labour Code, under which this application is brought, to support the conclusion that the membership of a bargaining unit "freezes" when a strike or lockout occurs. The bargaining unit continues to exist, its membership may continue to

evolve, and the incumbent union continues to be the bargaining agent for it.

The argument, as usually put, is that persons hired after the commencement of a strike, as replacements for striking employees, have no community of interest with such striking employees, and so do not form part of the bargaining unit. This argument has found favour with various labour relations boards, including this Board, most recently in the Nationair case (Nolisair International Inc. (Nationair Canada) (1992), as yet unreported CLRB decision no. 980). We disagree with this view for two principal reasons: (1) it rests on an analysis of the concepts of "bargaining unit" and "community of interest" that is, in our opinion, incomplete, and (2) its effect is to deprive employees indefinitely of their right to collective bargaining, and of their right to choose their bargaining agent.

Before turning to a consideration of these questions, we will deal briefly with the argument advanced on behalf of the applicant that to exclude the "replacement workers", as they may generally be called, would be a violation of their rights under the Canadian Charter of Rights and Freedoms. Section 2(d) of the Charter enshrines the right of freedom of association. That, however, does not involve a guarantee of the right to bargain collectively: see Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; and (1987), 38 D.L.R. (4th) 161 and Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367. Inclusion or exclusion from a bargaining unit is a matter properly determined by a Board such as this. We do not consider that a violation of the replacement workers' Charter rights would occur were we to accept the respondent union's arguments as to who should or should not be included in the bargaining

unit. As will be noted below, the Code does in fact suspend workers' rights in this regard for a determined period. We do not consider this to be in violation of the Charter.

We turn now to the question of what persons are covered by the present application, and come within the bargaining unit we have found to be appropriate. It is essential to remember that there is an existing bargaining unit. That unit is in the nature of an "all-employee (blue-collar)" unit. CASAW is the certified bargaining agent for that unit of employees; it has exclusive authority to bargain collectively on behalf of the employees in the unit (section 36(1) of the Code). Were CASAW to conclude a new collective agreement with the employer, all employees in the bargaining unit would of course be bound by that agreement (section 56 of the Code). These would include any persons hired after the strike began. While it is no doubt true that many of the "replacement workers" would lose their jobs upon the return of workers now on strike, it is nonetheless the case, now, that CASAW is their exclusive bargaining agent, that the employer may bargain with no other union in respect of them and that no other union may seek to bargain with the employer on their behalf.

As we have said, we consider the existing bargaining unit to be the appropriate bargaining unit in this case. That means that those employees who are currently working, as well as those who are on strike or locked out, come within the unit. They are all "employees". Not one of the employees with whom we are concerned comes within any of the excluded categories. Issues of "community of interest" and of the inclusion or exclusion of particular employees are dealt with at the time the bargaining unit is determined. Once the unit is determined and until it is changed, those issues are irrelevant to any questions of membership in a

particular unit; such questions are determined on the basis of employment status and reference to the existing unit description. They are essentially questions of fact, not of policy.

It has nevertheless been argued that the "replacement workers" have no community of interest with the employees who are on strike. In some of the cases this is asserted as a self-evident truth. We disagree with such an assertion. It is important not to confuse the definition of the unit (which remains constant until the Board changes it) with the content of the unit so defined (the actual membership, which changes with the employment rolls, or with employees' duties and responsibilities).

The expression "bargaining unit" is quite appropriately used in two ways, one to refer to the definition or concept, and the other to refer to the particular group of persons who may constitute the membership of a bargaining unit from time to time. In the instant case, the "bargaining unit" in the first sense is "all employees in the mine ..."; the "bargaining unit" in the second sense refers to the group of persons who are, at any given time, "employees in the mine ... " and not covered by any of the listed exclusions. At the time the application in this matter was made, the bargaining unit in this second sense included, in fact, both the strikers and the replacement workers.

A group of employees may be excluded from what would otherwise be "all-employee" bargaining units, by reason of the particular characteristics of the group which would give it a different community of interest from other employees. Thus, office workers are almost invariably put in separate bargaining units from "blue-collar" workers. Professional employees are sometimes, but not always, put in distinct

units (for an example of a case where they were not, see Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661), where a small group of nurses was included in the much larger "industrial" bargaining unit). In such cases "community of interest" is determined having regard to the characteristics of the jobs involved, and of suitability for collective bargaining, but not according to what may be the personal interests of the individuals concerned. Two persons may be members of "communities" having very different and even conflicting "interests", and yet in respect of their working lives, those persons may find themselves within the same bargaining unit.

"Community of interest" is a function of job (as opposed to task) characteristics: separate bargaining units are not carved out on the basis of gender, race, age, political or economic views, labour relations opinions or other inappropriate criteria. They may be carved out - although this is less and less frequent - on the basis of craft. An uncertain area is that of exclusion on the basis of regularity of employment.

In this regard, we note that in the instant case the bargaining unit as presently defined does not exclude "part-time", "casual" or "temporary" employees. If, during the time when the collective agreement was in force between CASAW and the employer, the employer had hired any part-time, casual or temporary employees, those persons would have been subject to the terms of the collective agreement. They would not have been entitled to bargain separately with the employer, because they would have come within the bargaining unit for which CASAW was exclusive bargaining agent. It still is the bargaining agent, and if the employer now has any part-time, casual or temporary

employees in its mine or mill operations, they come within the CASAW bargaining unit.

The respondent CASAW would exclude the "replacement" workers from membership in the bargaining unit on the basis that their employment is "temporary". If the logic of this had been rigorously followed, CASAW would have sought a redefinition of the bargaining unit to exclude "temporary" employees. Leaving aside the question whether or not the replacement workers are indeed "temporary" in any meaningful sense, the effect of that would be that the "temporary" workers, not coming within an existing bargaining unit, would be entitled to organize separately and to participate in collective bargaining through the bargaining agent of their choice, whether as part of a unit of "temporary" employees, or as part of a "tag-end" unit or some other unit. That is, if these employees were not to be included in the present bargaining unit, they would have to be accommodated in some other bargaining unit. That would be their right under the Code.

In fact, the separation of the "replacement" workers from the present unit on the basis that they are "temporary", and the definition of a unit of "temporary" workers would lead (on the present membership evidence) to the certification of the applicant for a unit of "temporary" employees - being most of those actually working, but leaving out the "permanent" employees who have crossed the picket line and are working. The employer would then be required to bargain with the applicant in respect of those employees, and with the respondent CASAW in respect of the rest. There would be two bargaining units of persons engaged (or expecting to be engaged) in the same sort of work and on the same property, and with respect to whom the same sort of terms and conditions of employment should apply. We consider such a

situation undesirable, to say the least. We do not consider that there should be two blue-collar bargaining units at the mine. We consider that there should be one such unit, and that it should be defined as it is now. Such a unit includes the "replacement" workers.

We do not share the opinion that "replacement workers" have no community of interest with the other employees, and in particular the striking employees, represented by the bargaining agent. That the vast majority of the "replacement workers" want collective bargaining with a view to a collective agreement is clear from the membership evidence submitted with this application. They have a natural interest in regulated working conditions, a procedure for the resolution of grievances and good wages and benefits. Certainly the scheme of the Code is to encourage collective bargaining to those ends. These employees may, as individuals, support different sorts of provisions relating to wages and working conditions than would the strikers, but differences of that sort are not unusual in any bargaining unit.

In many industrial units there is a considerable difference between the bargaining interests and goals of skilled and unskilled employees, for example, and considerable tension often exists between such groups. Many years ago, collective agreements routinely set out separate rates of wages for male and female workers, yet both groups of employees came within the same bargaining unit. At present, bargaining in many industries is affected by tensions between groups of employees having greater or lesser seniority.

The latter point may touch on the principal difference, from a collective bargaining point of view, between the two main

groups of employees in question, the strikers and the "replacement workers". The strikers have invested, in some cases at least, years of their working lives in their jobs. It should not be open to an employer, by making a deal with a new union, to deprive those workers of the benefit of those years. We adopt that principle. It does not, however, go to the question of community of interest as that expression should be used with respect to the determination of bargaining units. The principle applies rather with respect to the determination of an unfair labour practice. As this Board has held, in Eastern Provincial Airlines Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRB no. 448), a decision with which we respectfully agree, the rights of returning strikers prevail, in general, over those of "replacement workers". This is a point with which counsel for the applicant agreed, arguing correctly in our view, that the "replacement workers" should more accurately be described not as "temporary", but as "subordinate".

In any event, we do not consider that the "replacement workers" in this case should be described as "temporary", or at least that such description should deprive them of the right to collective bargaining. There is no suggestion that their employment is for a fixed term (even if it were, such persons would normally be included in an industrial bargaining unit). They are temporary, or were when first hired, in the sense that they had little realistic expectation of employment when the strike ended and striking workers returned. As time has gone by, some of them at least may be seen to have such an expectation, since the number of striking employees is less now than it was at the beginning of the strike.

Further, it is open to argument that the strike may have been lost. We make no comment as to that, but it is appropriate to point out that there is no way of knowing when the strike may be over. It is possible that it will never be over.

Under the Canada Labour Code, it would appear that a strike may end in one of three ways: (1) when a bargaining agent declares it over, and employees return to work; (2) when a bargaining agent loses its bargaining rights, whether by revocation or by the certification of another bargaining agent; or (3) when a collective agreement is reached. It may be that none of those events will occur, or that none of them will occur for some time. In the meantime, the employment force continues to evolve and it becomes clearer that to describe the "replacement workers" as "temporary" has no helpful meaning: they have become regular employees, "subordinate" though they may be, whose employment may or may not cease if and when the strike ends. As we have said, such persons should not be part of a separate bargaining unit, and they are at present part of the existing bargaining unit. They have a right to collective bargaining.

It was argued by counsel for CASAW that a bargaining unit is defined in terms of jobs, and that there cannot be two employees for one job. That might at first sound forceful, but it is inaccurate. A bargaining unit is defined in terms of jobs, but it contains people having, or having a claim on, those jobs. It is often the case - where employees are absent due to illness or vacations, or more significantly, where they are laid off - that a list of employees is longer than the list of available jobs. The serious point to remember is, as we have said, that the "replacement workers" are subordinate to the strikers in this regard.

This brings us to the second principal ground on which we differ from the view that only persons who were employed at the time a strike began are entitled to vote on the question of the right of a trade union to be the bargaining agent for the employees in a bargaining unit. In our view, all employees in a bargaining unit are entitled to vote on the question of who shall be the bargaining agent for that unit. Union representation is based on the wishes of "a majority of the employees in the unit" (section 28(c) of the Code) and in our view that means a majority of all the employees in the unit. That is, the question of eligibility to participate in the determination of a bargaining agent's representative character is decided when the bargaining unit is determined.

In the Nationair case, as in others where a similar conclusion has been reached, the Board dealt with the question of eligibility to vote without significant reference to the matter of bargaining unit determination, or to the significance and effect of section 24(3) of the Code. In Nationair, the Board stated at page 7:

"The general scheme of the Code and the legislative rules that give substance to the principles governing the organization of collective labour relations, in particular the rules relating to collective bargaining and the exercise of forms of economic pressure, do not support the argument that replacement employees have an interest in the selection of a bargaining agent during a strike or lockout."

The analysis we have set out above is to the contrary. It is true, as the Nationair case shows, that the scheme of the legislation empowers a bargaining agent (democratically chosen, in the first place, to represent all members of a bargaining unit determined by the Board) to bargain effectively, and that it protects that bargaining agent from attacks on its representativity except at certain times. In

particular, as we have noted above, even though a collective agreement may have expired and an incumbent trade union might otherwise be subject to a raid, an application for certification may not be made during the first six months of a legal strike or lockout. That desirable protection is thus furnished by a specific and precise provision in the Code, namely section 24(3). That provision does not deal, explicitly or implicitly, with the question of who shall be a member of a bargaining unit and so entitled to a voice on the issue of his or her union representation. That question is explicitly dealt with in other provisions of the Code, set out above.

We recognize the importance of the policy of protecting a bargaining agent which is engaging in difficult negotiations from an attack on its bargaining rights at a critical time, such as during a strike or lockout. Such a policy was put forward in Canadian Industrial Relations: The Report of Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968) - the Woods Report - which recommended (recommendation no. 466(3)) that "no employee hired during a lawful strike should be allowed to participate in such a petition or representation vote until a year after the commencement of that strike." That general policy was adopted by Parliament (although the prohibition enacted was for six months rather than one year) and is expressed in section 24(3) of the Code. It is noteworthy that while Parliament opted for a shorter limitation on the rights of replacement workers than the Woods Report had recommended, it went beyond the recommendation in another sense, giving an incumbent union complete protection both from raids and from revocation applications (see section 38(5)), throughout that period. The enactment of an extension to that policy is surely a matter for Parliament, not for this Board. The

effect of the Nationair decision was to extend the policy indefinitely.

The Nationair decision went on to describe the entitlement to bargain, its continuation with respect to successor employers and the protection of the employment rights of striking employees. The Board then stated at page 12:

"Since these legislative rules are in place and since the interpretation given to them is accepted, answering the question of which employees are eligible to select a bargaining agent, where an application for certification is filed during a strike or lockout, necessarily involves identifying the employees who are affected by the dispute leading to the declaration of a lockout and who have an interest in the outcome. ..."

and at page 13:

"In the Board's opinion, these employees are the ones who bargained unsuccessfully with the employer, through their certified bargaining agent, during the bargaining process which has yet to be completed. ... In short, they are the ones who belonged to the bargaining unit on November 19, 1991, who were affected by the collective bargaining then in progress and who have an interest in the outcome."

For the reasons we have outlined above, answering "the question of which employees are eligible to select a bargaining agent" is not difficult, when the scheme of the particular legislation under which this application is brought is followed carefully. The employees entitled to participate in the selection of their bargaining agent are the employees for whom that agent will thereafter be entitled to bargain, that is, all the employees in the bargaining unit. The question at this point is not one of policy but one of fact.

There is simply no legislative authority for depriving some of those employees of a voice in the selection of their

bargaining agent on the basis of speculation as to the extent of their "interest in the outcome". To impose such a criterion of eligibility is, in our view, to give the provisions of the Code an interpretation they cannot reasonably bear. Indeed, it is to alter or add to the Code.

While we consider, for the reasons we have given, that such an interpretation of the Code is unreasonable, we are also of the view that such an interpretation is contrary to "the scheme of the Code" in that it would deprive employees - indefinitely - of their right to collective bargaining. We strongly disagree with the view that the whole class of employees hired since the strike began "simply do not count" (Adams Laboratories Ltd. et al., [1980] 2 Can LRBR 101 (B.C.)), cited with approval in Nationair, at page 15). It sweeps, at least in the circumstances of the instant case, a wide range of workers, some of whom certainly have real hopes of permanent employment, some of whom (like laid-off employees under a collective agreement) have "subordinate" rights and all of whom are entitled to be taken seriously, into the same basket.

Finally, the Board in the Nationair case stated, at page 15, that:

"To give another interpretation of the notion of employee for the purpose of determining the representative character of a trade union during raiding in the course of a strike or lockout would negate the process of union representation by condoning interference in the expression of the wishes of the employees concerned. ..."

This of course begs the question of who are "the employees concerned", and we have given our reasons for considering the "employees concerned" in this case to be, in law and in fact, all employees in the bargaining unit. To confirm this democratic principle is certainly not to "negate the process

of union representation". On the contrary, it is to ensure that that process is a democratic one, as contemplated by the Code. Far from interfering with it, it permits the full and free expression of employee wishes. The Board in Nationair went on to say, also at page 15, that an interpretation such as we have given would "compromise the fulfilment of the objectives of the collective bargaining system established by the Code and, at the same time, the objective of industrial peace." With respect, we think the contrary is the case, especially in the circumstances of the matter now before us.

For all of the foregoing reasons, we consider that all persons coming within the scope of the bargaining unit as determined by the Board are entitled to be considered in making our determination under section 28(c) of the Code, and that that determination is to be made as of the date of the application.

That having been said, we will address the representative status of the applicant in the bargaining unit we have deemed to be appropriate. We have considered the confidential report of the Board's labour relations officer with respect to this representative status. We note that the list of employees in the unit at the date the strike or lockout began is an agreed list. The labour relations officer has reported in confidence with respect to the list of employees presently working. Apart from persons who, it is clear, have died or retired or whose employment relationship has otherwise been severed, there are a number of cases of persons whose employment relationship with the employer is in some doubt. Some persons had been discharged prior to the strike or lockout, while others were discharged as a result of alleged activities in connection with the strike or lockout. The cases falling within the first group

are subject to pending arbitration; those in the second group are, for the most part at least, subject to a pending unfair labour practice complaint before this Board (file no. 745-4527). In neither case can it be said with finality that the employment relationship does not exist at the present time.

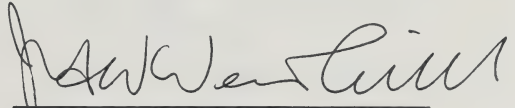
Members of each group clearly have an interest in the selection of the bargaining agent which would represent them, whether at arbitration, before this Board, or in negotiations. It has been the Board's practice to permit such persons to vote (that is, to be counted with respect to the matter of union representation), and indeed to cast unsegregated ballots. We consider that policy to be appropriate. While the matter does not appear to have been dealt with in any Reasons for decision issued by this Board, we are in agreement with the decision of the British Columbia Labour Relations Board in Canadian Inn (Coast Hotels Ltd.), no. 128/85, April 19, 1985, application for reconsideration dismissed in Canadian Inn (Coast Hotels Ltd.), no. 153/85, May 17, 1985; Cornell Chevrolet Oldsmobile Ltd., no. 323/86, December 17, 1986; and Citation Industries Ltd., no. C165/89, August 1, 1989.

The Board's consideration of the membership evidence filed in support of the application reveals that the applicant does not represent a majority of the employees in the bargaining unit determined to be appropriate. Accordingly, the application for certification will be dismissed.

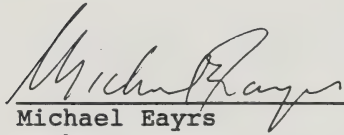
The present certification application has been dealt with without regard to the matters arising in the unfair labour practice complaint (file no. 745-4527). The dismissal of the application for certification, even though it was at one time "consolidated" with the unfair labour practice

complaint, does not of course imply the dismissal of the unfair labour practice complaint. The unfair labour practice case will be dealt with in due course.

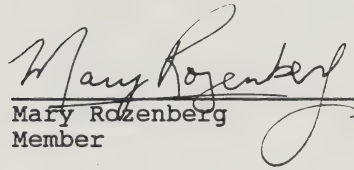
For all of the foregoing reasons, the application for certification is dismissed.



J.F.W. Weatherill
Chairman



Michael Eayrs
Member



Mary Rozenberg
Member

ISSUED at Ottawa, this 5th day of May, 1993.

CLRB/CCRT - 1010

information

This is not an official document. Only the Reasons for decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

SUMMARY

Bill White et al., applicants, United Steelworkers of America, Local 3313, bargaining agent, and Customized Transportation, Ltd., employer.

Board File: 566-20

Decision No.: 1011

Application for revocation of provincially issued certification order. The evidence shows that the employer is a trucking company regularly engaged in interprovincial transportation. Invalid provincial certification. Canada Labour Code (Part I - Industrial Relations). Sections 3, 18, 24, and 38. Board can neither revoke nor annul a certification order it did not issue. The application as filed was dismissed.

An invalid provincial certification can however generate a valid voluntary recognition under the Code (Cable T.V. Limited (1979), 35 di 28; [1980] 2 Can LRBR 381; and 80 CLLC 16,019 (CLRB no. 188)).

When in presence of a voluntary recognition, the Board may disqualify a voluntarily recognized bargaining agent pursuant to section 38(3). In this case, the Board found that the parties had signed a two-year collective agreement which contained a valid voluntary recognition clause. The Board processed the application for revocation in accordance with section 38(3). Having found that the application was timely and supported by the majority, the Board granted it.

RÉSUMÉ

Bill White et autres, requérants, Métallurgistes unis d'Amérique, section locale 3313, agent négociateur, et Customized Transportation, Ltd., employeur.

Dossier du Conseil: 566-20

Décision n° 1011

Demande de révocation d'un certificat d'accréditation délivré en vertu de la législation provinciale. Le dossier révèle que l'employeur exploite une entreprise de camionnage oeuvrant de façon régulière dans le secteur du transport interprovincial. Syndicat erronément accrédité en Ontario. Code canadien du travail (Partie I - Relations du travail). Articles 3, 18, 24 et 38. Le Conseil ne peut révoquer ni annuler un certificat d'accréditation qu'il n'a pas lui-même délivré. La demande telle qu'elle a été présentée a été rejetée.

Une accréditation rendue sans compétence par une province peut néanmoins donner naissance à une reconnaissance volontaire valide selon le Code (Cable T.V. Limitée (1979), 35 di 28; [1980] 2 Can LRBR 381; et 80 CLLC 16,019 (CCRT n° 188)).

S'il est en présence d'une reconnaissance volontaire valide, le Conseil peut priver un syndicat de son mandat d'agent négociateur selon le paragraphe 38(3) du Code. En l'espèce, le Conseil a jugé que les parties avaient conclu une convention collective contenant une clause de reconnaissance volontaire valide. Le Conseil a traité la demande en conformité avec le paragraphe 38(3) du Code. La demande étant présentée dans le délai et ayant l'appui de la majorité, le Conseil l'a donc agréée.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Bill White et al.,
applicants,
and
United Steelworkers of
America, Local 3313,
bargaining agent,
and
Customized Transportation,
Ltd.,
employer.

Board File: 566-20

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. Robert Cadieux and Patrick H. Shafer, Members.

Appearances on record

Mr. Bill White, for a group of employees;
Ms. Marie Kelly, for the United Steelworkers of America
(Local 3313); and
Mr. Robert Budd, for Customized Transportation, Ltd.

These reasons for decision were written by Mr. Serge
Brault, Vice-Chairman.

I

This is an application for revocation filed on
November 23, 1992 by a group of employees of a trucking
company, Customized Transportation, Ltd. (CTL or the
employer), working in St. Thomas, Ontario. It is unique
in the sense that while it is filed with this Board
pursuant to the Canada Labour Code (Part I - Industrial
Relations), it actually seeks the revocation of a
certification order issued in 1990 under the Ontario
Labour Relations Act, R.S.O. 1990, by the Ontario Labour
Relations Board (OLRB file no. 2411-89-R). The United

Steelworkers of America (hereinafter the union) is the alleged bargaining agent. The certification order describes the unit as follows:

"... all employees of Customized Transportation, Ltd. in the City of St. Thomas, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff."

The employer and the union are allegedly currently covered by a two-year collective agreement which expired on February 18 of this year. It contains the following provision:

"WHEREAS, the parties hereto desire to establish, maintain, and regulate the standards of hours, rates of pay, and other terms and conditions of employment, under which the employees of the Company shall work for the Company during the term of this Agreement, and

WHEREAS, the parties hereto desire to establish, maintain, and regulate the mutual relationships between the Company on the one hand and the Union on the other hand with a view to securing harmonious cooperation between them,

NOW, THEREFORE, the parties mutually agree as follows:

ARTICLE 1

UNION RECOGNITION

A. The Company hereby recognizes the Union as the sole and exclusive bargaining agent on behalf of all employees in the collective bargaining unit (hereinafter sometimes referred to as the 'unit' or the 'bargaining unit') employed within a radius of sixty (60) km. of its location at 381 South Edgeware Road, St. Thomas, Ontario. UNIT: All employees of the Company in the above described unit save and except supervisors, persons above the rank of supervisor, and office, clerical and sales staff."

The union does not oppose the application while the employer does not make any submissions on its merits. The

application has the support of the majority of the employees in the unit.

CTL has three other bargaining units in Chatham, Brampton and Toronto/Mississauga. Two of them are certified with the union under Ontario legislation while the other is a voluntary recognition with Local 832 of the International Allied Workers of America. The union's Brampton unit is the subject of a parallel application before this Board seeking the revocation of its certification (Board file no. 566-21).

The instant case was decided without a hearing, on the basis of the submissions of the parties and the Board officer's report.

What the Board needs to determine is whether CTL is federal and, if so, if the application for revocation can be addressed on its merits.

II

Constitutional Jurisdiction

Section 4 of the Code states:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Section 2 of the Code defines what constitutes a federal undertaking subject to our jurisdiction. It states:

"'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province, ..."

The Board officer's unchallenged report describes CTL as follows:

"7. The Employer

Customized Transportation Ltd. (CTL) operates primarily as an automotive parts and sub-assemblies carrier.

...

CTL possesses operating authorities to conduct both intra-provincial and extra-provincial transportation.

CTL advises that the extra-provincial activities account for approximately 20% of the company's business in Ontario. This portion of the operation involves the movement of goods between points in Ontario, Quebec and the United States.

CTL operates four terminals in Ontario; St. Thomas, Chatham, Brampton, Toronto/Mississauga."

It follows that CTL is federal.

III

Since the certification order issued to the union by the OLRB is apparently void, it cannot legally give a union a bargaining agent status. This Board does not have the authority under section 18 to declare null a certification order issued by a provincial jurisdiction.

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it,

and may rehear any application before making an order in respect of the application."

(emphasis added)

Neither does it have the authority to revoke such an order under section 38(1):

"38.(1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union."

Had the union and CTL not signed a collective agreement, our enquiry would end here and the application would be dismissed. But aside from certification, there is another way for a union to achieve the status of bargaining agent.

What any applicant in revocation seeks to achieve is the cancellation of the incumbent union's bargaining agent status.

To fully address the problem the parties are facing we still need to look at the situation created by the collective agreement they have entered into. Is that collective agreement signed by the union and CTL still valid, if it ever was, and if so, what are its effects?

The Board has determined long ago that an otherwise invalid certification issued under provincial legislation can nonetheless lead to the signature of a valid collective agreement under the Code (Cable T.V. Limited (1979), 35 di 28; [1980] 2 Can LRBR 381; and 80 CLLC 16,019 (CLRB no. 188)).

The reason for that flows from section 3 of the Code which provides that bargaining agent status can originate from two sources: certification or voluntary recognition. Hence, where a valid certification does not exist, you may find a valid voluntary recognition:

"'bargaining agent' means

(a) a trade union that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and the certification of which has not been revoked, or

(b) any other trade union that has entered into a collective agreement on behalf of the employees in a bargaining unit

(i) the term of which has not expired, or

(ii) in respect of which the trade union has, by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining; ..."

Where a provincial certification is null for lack of constitutional jurisdiction of the provincial tribunal, we may still find a valid voluntary recognition where a collective agreement was signed. This will depend on how the agreement is drafted.

As we saw earlier (page 2), article 1 of the collective agreement contains a union recognition clause. We find that clause to be a valid voluntary recognition under the provisions of the Code. This being so, we need to address the merits of this application to determine whether the Board should make a declaration under section 38(3), which is the equivalent of a revocation but for a bargaining agent that has been voluntarily recognized. That section provides as follows:

"38.(3) Where a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by

the Board, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the bargaining unit."

IV

With regard to timeliness, section 38(4) provides:

"38.(4) An application for an order pursuant to subsection (3) may be made in respect of a bargaining agent for a bargaining unit,

(a) during the term of the first collective agreement that is entered into by the employer of the employees in the bargaining unit and the bargaining agent,

(i) at any time during the first year of the term of that collective agreement, and

(ii) thereafter, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24; and

(b) in any other case, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24."

Section 24 provides as follows:

"24.(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit.

...

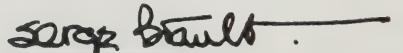
(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; ..."

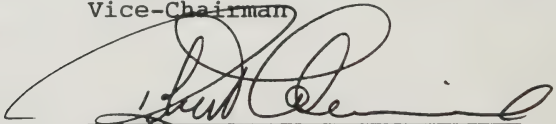
Section 24(1)(c) provides that where a collective agreement of three years or less is in force, a declaration under section 24 can only be made "during the last three months" of the agreement.

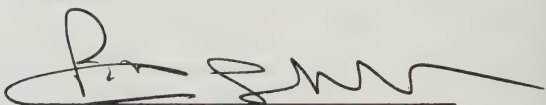
CTL's agreement expired on February 18, 1993. The application was filed on November 23, 1992 and is timely.

The Board officer's confidential report filed pursuant to section 28 of the Regulations shows there is majority support in favour of the application which the union does not dispute. The application being timely and supported by the majority of employees in the unit, it is hereby granted.

A formal declaration pursuant to section 38(3) will issue accordingly.


Serge Brault
Vice-Chairman


Robert Cadieux
Member


Patrick H. Shafer
Member

ISSUED at Ottawa, this 18th day of May 1993.

CLRB/CCRT - 1011

CAI
L100
-ISS

Information

This is not an official document.
Only the Reasons for Decision can
be used for legal purposes.

Ce document n'est pas officiel.
Seuls les Motifs de décision
peuvent être utilisés à des fins
juridiques.

Summary

James Thomas Rogers, complainant,
Canadian Union of Postal Workers,
respondent union, and Canada Post
Corporation, employer.

Board File: 745-4297

Decision No.: 1012

Résumé

James Thomas Rogers, plaignant, le
Syndicat des postiers du Canada,
syndicat intimé, et la Société
canadienne des postes, employeur.

Dossier du Conseil: 745-4297

Décision n° 1012

The complainant alleged in this case that the Canadian Union of Postal Workers breached its duty of fair representation to him (section 37 of the Canada Labour Code (Part I - Industrial Relations)) when it withdrew his termination grievance from arbitration after it could not contact him about the arbitration that was to have taken place while he was absent from his home on vacation.

The facts of the case led the Board to conclude that the union had not acted unreasonably under the circumstances and that section 37 had not been violated.

Le plaignant allègue que, dans la présente affaire, le Syndicat des postiers du Canada a manqué à son devoir de représentation juste (article 37 du Code canadien du travail (Partie I - Relations du travail)), lorsque le syndicat a retiré le grief concernant son congédiement de la procédure d'arbitrage après ne pas avoir pu lui communiquer pendant qu'il était en vacances qu'une telle procédure devait avoir lieu.

Les faits de la présente affaire ont amené le Conseil à conclure que le syndicat n'avait pas agi de façon déraisonnable dans les circonstances et que l'article 37 n'avait pas été violé.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

James Thomas Rogers,
complainant,
and
Canadian Union of
Postal Workers,
respondent union,
and
Canada Post Corporation,
employer.

Board File: 745-4297

The Board was composed of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and Michael Eayrs.

Appearances

Mr. James Thomas Rogers, on his own behalf;
Ms. Mary Hart, for the Canadian Union of Postal Workers;
and
Mr. Ian Szlazak, for the Canada Post Corporation.

These reasons for decision were written by Vice-Chairman Eberlee.

I

At a hearing in Toronto on April 6, 1993, the Board addressed a complaint by James Thomas Rogers, filed July 27, 1992, which alleged that the Canadian Union of Postal Workers had violated section 37 (the duty of fair representation provision) of the Canada Labour Code (Part I - Industrial Relations) when it withdrew his dismissal

grievance from arbitration.

Counsel for the Canadian Union of Postal Workers (CUPW) told the Board at the outset of the hearing that the facts in Mr. Rogers case were similar to those in another matter involving CUPW (Dennis Hollick (1992), 16 CLRBR (2d) 114; and 92 CLLC 16,049 (CLRB no. 938) where the Board decided that the withdrawal of a grievance constituted, under the circumstances of the case, a breach of section 37. In that instance, the Board ordered that the withdrawal be nullified and that the matter proceed to arbitration. The union's counsel asked the Board to make a similar finding and order a similar remedy for Mr. Rogers. This was also the complainant's position.

II

The facts are not in dispute. Mr. Rogers had been employed by Canada Post since 1976 on a part-time basis as a mail service courier on Saturdays and Sundays. During the summer of 1990, he injured his back. There was a dispute between him and Canada Post over the whole situation. He did not work for Canada Post after this disagreement arose. Ultimately Canada Post placed him on "off-duty status" without pay or benefits until he produced a medical form indicating that he was physically fit to perform his regular duties as a mail service courier. The employer also challenged before the Workers' Compensation Board Mr. Rogers' submission that he had been injured on the job.

Mr. Rogers opposed Canada Post's stance and finally a grievance was filed in August 1990, which stated that he had been struck off strength by Canada Post due to an

occupational injury. The file suggests that Mr. Rogers continued for many months thereafter to be on off-duty status. He did not provide the medical documentation demanded earlier by the employer.

Canada Post asked again in December 1990 for medical documentation. It was not provided. In March 1991, the employer wrote further letters requesting information and documentation from Mr. Rogers. There was no reply. Finally, in July 1991, Canada Post advised Mr. Rogers that he had been terminated. A grievance was then filed by the union on Mr. Rogers' behalf.

The Board has no reason to suppose that the foregoing background had anything to do with the union's subsequent conduct, nor, indeed, has it had any influence upon the Board's view of the relevant facts which will be outlined in the next section. It has been presented here merely for the sake of sketching a picture showing how the dismissal grievance arose.

III

Mr. Rogers testified at the hearing that in August 1991, he met CUPW's counsel and a union officer. He was surprised to learn that an arbitration had actually been scheduled for his dismissal grievance. (According to the record, it was to have taken place on August 2, 1991, but was postponed by agreement of the parties on or about July 24, 1991, pending the clarification of Mr. Rogers' Workers' Compensation entitlement.)

Mr. Rogers told the Board that he understood the postponement was to allow for two factors: the first was to permit the Workers' Compensation issue to be resolved; the second was to provide an opportunity for Canada Post and CUPW to see if the grievance could be settled without having to proceed to arbitration. He acquiesced in the postponement. He testified that he believed the union would eventually notify him of any further developments.

Until June 1992, he did not hear further from the union. Nor did he make any effort to contact the union or to question where matters stood. He simply waited to be told if and when his grievance would be resolved or arbitrated.

It was not resolved; thus, it was rescheduled to be arbitrated on June 18, 1992.

Around June 5 or 6, Mr. Rogers went on holidays. He did not return to his residence until June 22.

In a letter dated June 8, 1992 and sent to his address by priority post, CUPW advised him that the arbitration would take place on June 18, 1992, and, listing three different phone numbers, asked him to contact the union as soon as possible. He did not see the letter until after his return from holidays, which was some four days after the scheduled arbitration.

It is obvious that in this particular case, the union required the presence of Mr. Rogers if it were to have any prospect of success at the arbitration. Instead of asking for a postponement - which the Board was advised is now being done in all cases where a grievor cannot be contacted

prior to an arbitration (and wisely so) - the union withdrew the matter from arbitration.

The union's action does not strike the Board as being unreasonable in the circumstances, one of the circumstances being the fact that Mr. Rogers had earlier displayed so little interest in the situation that he had not bothered to check with the union over some 10 months as to where matters stood. And another circumstance being that he was not sufficiently concerned or prudent about his own situation to contact the union before June 5 or 6 to advise that he would be absent for some time on holidays and to provide specific information as to where he might be reached.

Mr. Rogers told the Board that there was, in his view, a "principle of reasonable effort" involved, and that the union should have tried harder to reach him; in any case, he suggested it was not necessarily mandatory for an employee to be present at an arbitration and the union should have gone ahead in his absence. In the Board's opinion, however, any "principle of reasonable effort" must be applied to Mr. Rogers as well as to CUPW and there is no evidence that his "effort" in respect of his grievance was even as "reasonable" as that put forward by CUPW. Moreover, as has been suggested earlier, it appears quite obvious to anybody with even a modicum of knowledge about the arbitration process that this arbitration would probably have been abortive in the absence of the grievor and without his testimony.

Thus, in the end, the Board must decide whether CUPW made an error or a misjudgment in withdrawing the grievance,

rather than in securing a further postponement of the arbitration, which was so serious as to be arbitrary, discriminatory or in bad faith or otherwise contrary to section 37.

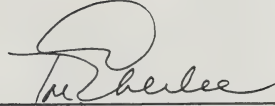
The facts in this matter, as cited earlier, appear to this panel to be different from the facts in the Dennis Hollick, supra, decision which was cited by CUPW's counsel. Whether or not the facts in the latter decision justified the determination made there by the different quorum of the Board is not for the instant quorum to judge.

As has been stated earlier in these reasons, this quorum cannot see anything particularly unreasonable in CUPW's decision to withdraw the grievance under all of the circumstances noted. There is absolutely no evidence of discrimination or of bad faith against Mr. Rogers by CUPW. On the other hand, if CUPW's decision to withdraw can be characterized at all as an error or a misjudgment, it was nothing more than "simple negligence", which the Board has found in numerous previous cases not to constitute arbitrariness and not to be contrary to section 37.

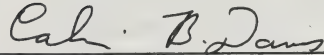
In this respect, the previous case which appears to come closest to the circumstances of this matter is Cathy Miller (1991), 84 di 122 (CLRB no. 854). It must be said, however, that the facts here are even more persuasive that there has been no violation of section 37 than are the circumstances set out in the Cathy Miller decision, supra. There is a great deal said in that decision about section 37, in general, and about CUPW and Canada Post, in particular. This panel, without repeating the other quorum's analysis and dicta adopts them and applies them in

this matter, as well.

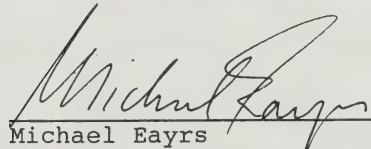
The complaint is dismissed.



Thomas M. Eberlee
Vice-Chair



Calvin B. Davis
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 7th day of May 1993.

CLRB/CCRT - 1012

information

This is not an official document.
Only the Reasons for Decision can
be used for legal purposes.

Ce document n'est pas officiel.
Seuls les Motifs de décision
peuvent être utilisés à des fins
juridiques.

SUMMARY

Canadian Marine Officers' Union,
applicant, and Verreault Maritime
Inc., respondent.

Board File: 555-3509
Decision no. 1013

The Canadian Marine Officers' Union is seeking to be certified as bargaining agent for a unit consisting of licensed personnel who work on board the employer's ships.

The employer is opposed to the inclusion of the captain and the chief engineer in the bargaining unit, since these persons are not employees within the meaning of the Code. The other employees covered by the application are bridge officers and engineers.

The Board found that the chief engineer does not perform management functions. The authority he has over the other engineers and officers under his responsibility is of a professional and technical nature. He does not take part in an important and determining fashion in the selection of personnel, even if he does assess the performance of the employees under his responsibility. He carries out supervisory functions according to the criteria reproduced and analyzed in a case involving Island Telephone Company Limited. Moreover, the Board found that the captain performs management functions and, therefore, excludes him from the bargaining unit.

RÉSUMÉ

Syndicat canadien des officiers de marine marchande, requérant, et Verreault Maritime Inc., intimée.

Dossier du Conseil: 555-3509
Décision n° 1013

Le Syndicat canadien des officiers de marine marchande demande à être accrédité à l'égard d'une unité regroupant le personnel breveté qui travaille à bord des navires de l'employeur.

L'employeur s'est opposé à l'inclusion du capitaine et du chef mécanicien dans l'unité de négociation car ces personnes ne sont pas des employés au sens du Code. Les autres employés visés par la demande sont des officiers de ponts et des mécaniciens.

Le Conseil a décidé que le chef mécanicien n'exerce pas de fonctions de direction. L'autorité qu'il exerce sur les autres mécaniciens et les officiers dont il est le supérieur immédiat sont de nature professionnelle et technique. Il ne participe pas de façon importante ni déterminante à la sélection du personnel, même s'il procède à l'évaluation de rendement des employés dont il a la responsabilité. Il exerce des fonctions de supervision selon les critères repris et analysés dans une affaire mettant en cause Island Telephone Company Limited. Le Conseil a par ailleurs décidé que le capitaine exerce des fonctions de direction et l'exclut donc de l'unité de négociation.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Canadian Marine Officers'
Union,

applicant,

and

Verreault Maritime Inc.,

respondent.

Board File: 555-3509

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Ginette Gosselin and Ms. Evelyn Bourassa, Members.

Appearances

Mr. Paul E. Dion, assisted by Mr. Richard Vézina, for the Canadian Marine Officers' Union; and

Mr. Pierre Trépanier, assisted by Mr. Richard C. Beaupré, for Verreault Maritime Inc.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

Status of the Case

The Board received an application for certification from the Canadian Marine Officers' Union (the union) on October 30, 1992. The union was seeking to represent the following group of employees:

"all licensed bridge officers and officer engineers who work on dredges owned or operated by Verreault Maritime Inc."

(translation)

Verreault Maritime Inc. (the employer) objected to the inclusion of the positions of captain and chief engineer in the bargaining unit, claiming that these persons are not employees within the meaning of the Code, because they perform management functions. Furthermore, the employer requested that if the Board decided that they perform

supervisory duties, they be placed in a separate bargaining unit. The employer filed job descriptions for these positions. The union claimed that these were not accurate, but it did not give precise and detailed particulars in its written submissions. Instead, it filed with the Board certification orders from Quebec, in which the disputed positions were included.

The Board decided to hold a public hearing, which took place in Montréal on May 5, 1993.

Evidence

Two witnesses were heard, Richard Beaupré, the employer's executive vice-president, and Christian Pelletier, chief engineer. The facts relevant to this matter can be summarized as follows.

- The "Port Méchins" dredge, the only ship owned by the employer, was acquired on May 5, 1992. At the time the application for certification was filed, Verreault Maritime Inc. had been operating for only one season: from May to November of 1992.
- At that time, there were neither job descriptions nor written rules with respect to the procedures applicable to the management and assessment of personnel or the performance of duties. The job descriptions submitted to the Board were prepared after the application for certification had been filed.
- Apart from the captain and the chief engineer, the licensed personnel of the "Port Méchins" dredge during the 1992 season consisted of two engineers and two bridge officers. The rest of the crew consisted of dredge operators, sailors, pump men and a cook.

- The chief engineer is responsible for the operation of the engines and other machinery. The engineers and the pump men are his immediate subordinates, while the other crew members report to the captain.
- Although the captain and the chief engineer are each responsible for a department, the captain is "the most responsible," as Richard Beaupré, the employer's executive vice-president, explained. According to Mr. Beaupré, the captain is the person ultimately responsible for all activities of whatever nature on board the vessel; he has the final authority to make the decisions necessary for its proper operation.
- The number and classification of licensed employees required for the operation of the "Port Méchins" dredge are determined by applicable legislation and regulations. The seagoing personnel is selected from a list of applicants by the employer's administrative personnel, in other words by manager Denis Caron. These applicants are referred to the captain and the chief engineer, who may in this way select employees and recommend candidates. Their suggestions are not necessarily accepted (which was the case in 1992), that is to say they do not have the authority to make the final choice of employees.
- The captain and the chief engineer determine work and watch schedules and assign tasks to the employees in their respective departments according to their individual qualifications. The chief engineer explained that in the case of the engine room, the watch schedule is set in accordance with traditional rules. In this respect, he is required to intervene only to interpret and apply these rules if there is a problem.

- At the end of the 1992 season, the captain and the chief engineer assessed the performance of the employees under their supervision and submitted their reports to the manager.
- During the 1992 season, the captain and the chief engineer neither reprimanded nor disciplined the employees of the "Port Méchins" dredge.
- The chief engineer does not decide to lay off employees for long or short periods, even if he believes a personnel reduction is necessary. During the 1992 season, the captain, in consultation with manager Caron, exercised this authority. The same thing happened at the end of the season, when the captain advised the chief engineer that he and all the employees in his department would be laid off as soon as the ship reached port, even before completion of the work of putting the ship away for the winter. This decision was made jointly by the captain and the manager. The work was assigned to Verreault Navigation.
- The captain and the chief engineer, within their respective area of authority, are responsible for the co-ordination and liaison with the Coast Guard during inspections at the start of the season and the periodic inspections provided for under legislation and the regulations.
- At the start of the 1992 season, the captain and the chief engineer assessed the repairs needed by the ship for the navigation season. This assessment was forwarded to the employer, which prepared its budget estimates in light of the information it contained.

They also determined what supplies and equipment were required for the operation of the dredge. This exercise is also carried on throughout the season. The chief engineer must ensure that fuel, oil and the usual equipment are on board, to avoid having to stop in order to carry out minor or routine repairs. For this purpose, he periodically draws up a list of supplies to be purchased and gives it to the captain who forwards it to company officials. The chief engineer does not know the cost of the orders he prepares, because he does not have a price list. The purchases are made by representatives of the Verreault Group. The captain must also prepare similar lists for navigation activities.

If subcontractors are required to do repairs, for example when the boat is docked away from home port, the captain or chief engineer, in consultation with administrative personnel, may be responsible, depending on the situation, for finding these subcontractors and co-ordinating their work.

Decision

The Board considers that the chief engineer is an employee within the meaning of the Code and must be included in the bargaining unit. In view of the nature of and the manner in which he discharges his duties, the chief engineer is a department head who does not have decision-making powers with respect to the employees under his supervision. Although he sets work schedules and assigns tasks, the authority he exercises over licensed and non-licensed personnel is of a technical and professional nature.

His participation in the selection and evaluation of personnel is not related to management authority. The fact

that he must on occasion make routine decisions or recommendations which, if followed, may have a certain effect on the personnel he supervises, is not sufficient not to consider him an employee. He has no decision-making power in this respect. Similarly, the advice and opinions he gives the employer, for example with respect to repairs to be made at the beginning of and during the season, and the decisions he makes when he draws up the list of supplies to be purchased to ensure the proper operation of the dredge, are not attributes of a person who performs management functions. In performing these duties, he puts his knowledge and professional expertise at the service of the employer.

In Island Telephone Company Limited (1990), 81 di 126 (CLRB no. 811), the Board reviewed the general principles and rules developed by it and by other tribunals to interpret the concepts of management and supervision associated with the word "employee." It is relevant to reproduce here the section applicable to this case.

"a) There exists a hierarchy of management functions that acts as a useful criterion in the determination of employee or management status. From the multiplicity of functions involved in the act of management, such as budget preparation, corporate policy-making, work planning and organization, hiring and firing, performance appraisal, promotion or imposition of disciplinary sanctions, etc., some are definitively more important than others from an industrial relations perspective because they affect, or at least have the potential to do so, the basic career or job interests of the people they supervise or manage. This point has been made repeatedly by the Board (see Vancouver Wharves Ltd. [(1974), 5 di 30; [1975] 1 Can LRBR 162; and 74 CLLC 16,118 (CLRB no. 19)]; British Columbia Telephone Company [(1979), 38 di 145 (CLRB no. 221)], which also provides a detailed listing of its previous decisions on the definition and exclusion of management functions on page 155; Cominco Ltd. [(1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240)]; and Canada Post Corporation [(1989), 79 di 35; and 90 CLLC 16,007 (CLRB no. 767)]), but nowhere more clearly so than in Bank of Nova Scotia (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91), where it stated:

'The basis of the exclusion of certain "management" persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. This avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment conditions of fellow employees. It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g. the authority to dismiss or discipline fellow employees). ...'

(pages 457; 134; and 536)

In other words, the closer the function is to employment relations issues the greater the management content deemed present in that function.

b) Decision-making authority, not complex or expert knowledge, constitutes a proper basis for management exclusion. This is, in fact, a corollary of the previous observation. Proximity to employment relations is but one axis of the definition of management function; real decision-making is the other. To be involved in important decisions or in key areas of a company's operations through the provision of expert advice or technical knowledge is one thing; to use it to actual employment relations effect is another. In British Columbia Telephone Company (1976), 20 di 239; [1976] 1 Can LRBR 273; and 76 CLLC 16,015 (CLRB no. 58), the Board has commented extensively on the nature of this critical difference noting that, under the Code, 'the performance of functions of a highly technical or professional nature is not a bar to the inclusion in a bargaining unit' (pages 265; 281; and 467). In that same decision, it took exception to the proposition that the power to effectively recommend is generally equivalent to the power to decide. The existence in most good-sized organizations, particularly in the service industries, of a large core of knowledge workers and their clear impact on the overall quality of corporate decision-making does not detract from the obligation they have to meet a stringent decision-making test before they can be excluded on management grounds. Similarly, in Atomic Energy of Canada [(1978), 33 di 415; and [1979] 1 Can LRBR 252 (CLRB no. 156)], speaking of the role of foremen, it observed that their input into important decisions cannot be described as 'finally determinative.'

c) No individual or single criterion will in and of itself be determinative of the employee status of a particular stratum of 'management' personnel. Determination of employee status will rest in the end in the consideration of all factors discussed earlier and on the particular organizational configuration in which they find themselves. Conversely, no specific attribute, such as the exercise of supervisory duties, will automatically bar supervisors from forming or

joining a union as subsection 27(5) of the Code makes clear."

(pages 130-131; emphasis added)

In that case, the Board decided that first-level managers who had to perform much broader duties than the chief engineer were employees under the Code. The chief engineer plays an active and important role in the activities of the "Port Méchins" dredge; however, this role is primarily of a professional nature, and the supervisory component does not prevent him from being an employee within the meaning of the Code.

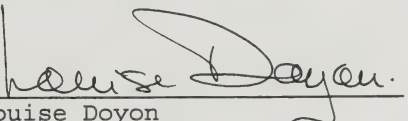
The Board concluded that the captain is not an employee. This decision is based on the fact that the captain has the final authority on board the "Port Méchins" dredge. Like the chief engineer, the captain performs supervisory duties of a professional nature over the employees in his department because he is responsible for the technical aspects of navigation. However, due to the existing hierarchical and operational structure, as well as the size of the company, the captain is the person ultimately responsible for the proper operation of the dredge. For this purpose, he may make any decisions required, including decisions that may have a definitive effect on the employees.

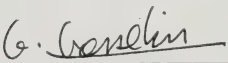
This last factor seems conclusive in this case. Having said this, the Board does not believe that the captain has significant managerial authority with respect to the development of the budget or policies of the company, as claimed by the employer. In this respect, his role is more of a professional nature and resembles some aspects of the chief engineer's role.

In view of our decision to exclude the captain from the bargaining unit, there is no reason to establish a separate unit for the chief engineer alone. The powers he exercises are not such as to create conflicts of interest with the other employees in the bargaining unit, and it would not be in the interest of harmonious industrial relations to establish such a bargaining unit.

The union meets the requirements of the Code and the Board decided to certify it with respect to the following bargaining unit:

"all licensed bridge officers and officer engineers who work on the Port Méchins dredge employed by Verreault Maritime Inc., excluding the captain."


Louise Doyon
Vice-Chair


Ginette Gosselin
Member


Evelyn Bourassa
Member

ISSUED at Ottawa, this 1st day of June 1993.

CCRT/CLRB - 1013

Information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Summary

Michael J. Mellor, complainant, International Association of Machinists and Aerospace Workers, Lodge 1751, respondent, and Air Canada, employer.

Board file: 745-4189
Decision no. 1014

Unfair labour practice. Duty of fair representation. Section 37. The International Association of Machinists and Aerospace Workers, Lodge 1751, filed a grievance for a group of employees affected by the employer's decision to subcontract their work. Complainant alleged in this case that the union violated its duty of fair representation in offering him a less generous settlement than the one offered to some other grievors.

Different groups of employees have different interests, and a trade union does not discriminate improperly by taking these into account in negotiating the settlement of complex matters. The Board concluded that the union had not violated section 37 of the Code.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Michael J. Mellor, plaignant, Association internationale des machinistes et des travailleurs de l'aérospatiale, section 1751, intimée, et Air Canada, employeur.

Dossier: 745-4189
Décision n° 1014

Pratique déloyale de travail. Devoir de représentation juste. Article 37. L'Association internationale des machinistes et des travailleurs de l'aérospatiale, section 1751, a déposé un grief au nom d'un groupe d'employés visés par la décision de l'employeur de sous-traiter leur travail. Le plaignant allègue en l'espèce que le syndicat a manqué à son devoir de représentation juste en lui faisant une offre moins généreuse que celle qui avait été faite à d'autres.

Différents groupes d'employés ont divers intérêts, et un syndicat ne fait pas preuve de discrimination s'il tient compte de ce fait dans la négociation du règlement de questions complexes. Le Conseil juge que le syndicat n'a pas violé l'article 37 du Code.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnements et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Michael J. Mellor,

complainant,

and

International Association of
Machinists and Aerospace
Workers, Lodge 1751,

respondent,

and

Air Canada,

employer.

Board file: 745-4189

The Board was composed of Mr. J.F.W. Weatherill, Chairman, Mr. Jean Guilbeault, Q.C., Vice-Chairman, and Mr. Robert Cadieux, Member.

A hearing was held in this matter at Montréal on February 24 and 25, 1993.

Appearances

Mr. D.L. McIninch, for the complainant;

Messrs. Michel Cyr and L. Giuliani, for the respondent;

Ms. France Caron and Mr. A. Powers, for the employer.

I

In this complaint, filed pursuant to section 97(1) of the Canada Labour Code, the complainant alleges that the respondent trade union violated section 37 of the Code. Section 37 imposes on a trade union a duty of fair representation of the employees in any bargaining unit it represents, and the respondent trade union is the bargaining agent for the bargaining unit of employees of Air Canada of which the complainant is a member. The respondent trade union thus owes to the complainant a duty

not to act "in a manner that is arbitrary, discriminatory or in bad faith" with respect to his rights under the collective agreement.

The complainant was first hired by the employer on November 23, 1981. He obtained permanent employment status in October 1984. His classification at all material times has been that of station attendant, and was his classification at the time of the hearing of this matter. For a certain period of time the complainant's work was that of "commissary truck driver". That term, however, refers not to a classification, but to a particular job within the classification of station attendant.

In 1990, the employer subcontracted its commissary, and the related food truck, operations in Canada. This directly affected commissary employees, and it affected persons such as the griever, who was no longer needed as a "commissary truck driver". As a station attendant, however, there was, for a time at least, other work available to the griever (it would appear that - very roughly - about 10% of station attendants had been working as commissary truck drivers).

The matter of subcontracting is dealt with in article 20 of the collective agreement, and a grievance was filed in respect of the subcontracting of the commissary and food truck operations. The complainant belonged to the group of employees for whose benefit the grievance was brought. The grievance was the subject of complex and protracted negotiations between the parties, and was eventually settled - along with other grievances relating to surplus-employee situations which had arisen - with the aid of a mediator. The settlement included the offer, by the employer, of severance packages to various groups of employees. The most generous package appears to have been

offered to commissary employees, whose practical options with respect to continuing employment seem to have been the most limited. A different, less attractive severance package was available to a certain number of station attendants, and according to the evidence, the grievor applied for such a package, his application would have been approved; the grievor nevertheless (perhaps due to a misapprehension with respect to his recall position - a matter for which the union was not responsible) did not avail himself of that offer. Rather, he exercised his option of lay-off with recall rights, and did not seek to bump, as he might have done, at another location. Other severance packages were made available to other groups of employees - not necessarily employees directly affected by the contracting out, but employees affected by a general downsizing of the employment force in which the employer was engaged.

The evidence is conflicting with respect to the existence of an individual grievance presented by the complainant following the notice of contracting out. No copy of the grievance was placed in evidence. We are prepared to deal with the matter on the basis that such a grievance was indeed presented, since the question to be determined by this Board remains the same: was that grievance, like the grievance which was settled, settled or otherwise dealt with in a manner which was arbitrary, discriminatory or in bad faith?

There is no evidence to suggest that the respondent trade union acted out of any sort of personal antagonism toward the complainant, nor is there any suggestion of anything which might motivate any such antagonism. The thrust of the complainant's case is that offers were made to others which were better than the offer made to him. The answer

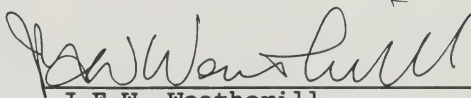
to that, supported by the evidence, is that such a system of differing offers was accepted by the trade union as part of a settlement of a number of grievances in order to support the continuation of as many jobs as possible. In fact, work was offered to the complainant on a temporary basis on a number of occasions. The complainant exercised his option of accepting or refusing that work, having regard to his own circumstances at the time.


Different groups of employees have different interests, and a trade union does not discriminate improperly by taking these into account in negotiating the settlement of complex matters such as those with which it had to deal in this case. These same events (the subcontracting of commissary operations, the subsequent downsizing and the mediated settlement of the many grievances arising out of those matters) have been the subject of other complaints before this Board: see Diane Mikolajek, April 8, 1991 (LD 1012); M. MacPhail, May 25, 1992 (LD 1029); and John McDermott, June 23, 1992 (LD 1034). In each case the Board applied the test set out in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, and concluded that there had been no violation of section 37 of the Code.

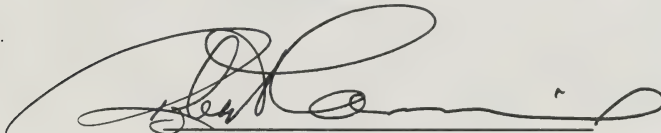
In the instant case, according to its evidence, the union considered that it had a 50-50 chance of winning the subcontracting grievance. While there is no evidence on this point, it would be surprising if the union were to rate its chances of winning on other grievances relating to the subsequent downsizing any higher than that. The union had to deal with these matters with diminished resources, and considered its overriding concern to be with the preservation of as many jobs as possible. The union was, we find, conscious of and gave due attention to the

interests of all employees; it treated the whole matter with great seriousness and with great care.

The union did not, we find, treat the complainant's grievances in an arbitrary or discriminatory way, or in bad faith. Accordingly, we find there has been no violation of section 37 of the Code, and the complaint is therefore dismissed.


J.F.W. Weatherill
Chairman


Jean L. Guilbeault, Q.C.
Vice-Chairman


Robert Cadieux
Member

ISSUED at Ottawa, this 28th day of May 1993.

CLRB/CCRT - 1014

Information

This is not an official document.
Only the Reasons for Decision can be
used for legal purposes.

Ce document n'est pas officiel.
Seuls les Motifs de décision peuvent
être utilisés à des fins juridiques.

Summary

MALCOM HORTON, COMPLAINANT; ADBY
EMPLOYEES' ASSOCIATION, RESPONDENT;
AND ADBY TRANSPORT LTD., EMPLOYER.

Board File: 745-4418

Decision No.: 1015

Résumé de Décision

MALCOM HORTON, PLAIGNANT; ADBY
EMPLOYEES' ASSOCIATION, INTIMÉ; ET
ADBY TRANSPORT LTD., EMPLOYEUR.

Dossier du Conseil: 745-4418

Décision n°: 1015

The complainant alleged that the respondent employee association breached its duty of fair representation (section 37 of the Canada Labour Code) when it withdrew his termination grievance from arbitration.

The facts of the case led the Board to conclude that the association, although acting in good faith and honourably, failed to represent the complainant. The Board stated that it could not accept, as fair representation, what amounts essentially to a total lack of representation.

In addition, although the association argued that one of the reasons it abandoned the complainant's grievance was to maintain a harmonious working relationship with the employer, the Board concluded that in the circumstances this was done without appropriate regard or recognition of the importance of Mr. Horton's individual interests in pursuing the grievance.

Le plaignant soutient que l'association d'employés a violé son devoir de représentation juste (article 37 du Code canadien du travail) lorsqu'elle a décidé de retirer du processus d'arbitrage son grief de congédiement.

Après avoir examiné les faits, le Conseil a conclu que cette décision de l'association, bien qu'elle ait été prise de bonne foi et de façon honorable, privait en fait le plaignant de représentation. Le Conseil a déclaré qu'il ne pouvait pas considérer comme une représentation juste ce qui constituait, en somme, l'absence d'une toute représentation.

De plus, bien que l'association ait soutenu qu'elle avait retiré le grief afin d'assurer notamment le maintien de relations de travail harmonieuses avec l'employeur, le Conseil a conclu que dans les circonstances cette décision avait été prise sans égard aux intérêts du plaignant dans la poursuite du grief.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Malcom Horton,
complainant,
and
Adbby Employees' Association,
respondent,
and
Adbby Transport Ltd.,
employer.

Board File: 745-4418

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin B. Davis and François Bastien, Members.

Appearances:

Mr. David Mercer, for the complainant; and
Messrs. Gary Manton, Herb Kotyk and Terry Beaudry,
for the respondent.

The reasons for this decision were written by Vice-Chair Richard I. Hornung, Q.C.

I

Malcom Horton brings an unfair labour practice complaint, pursuant to section 97(1), against Adbby Employees' Association, alleging a violation of section 37 of the Canada Labour Code. The timeliness of the complaint was not contested.

II

The salient facts of this case are not in dispute.

Mr. Horton began his employment with Adby Transport Ltd. on September 12, 1979, and continued to work there until October 17, 1991, when he was dismissed for alleged violations of the company's policy on speeding. He apparently exceeded the 90 km/h speed limit by up to 5 km/h on three occasions between August and October 1991.

Shortly after his dismissal, Horton sought the advice of Dale Armstrong, then president of the Employees' Association, and was told that he could do "whatever he liked", including suing the Employer directly, as long as it did not cost the Association any money. He also spoke with Mr. Gary Manton, the current President of the Association, who essentially gave him the same advice.

As a result, Horton retained a lawyer who issued a statement of claim on his behalf. Ensuing communications with the Employer satisfied Horton's counsel that the matter could not proceed in the courts and that a grievance-arbitration process should be initiated. Accordingly, Horton spoke with Manton in October 1992 and requested that the Association file a grievance on his behalf. He was advised at the time that the Association would not proceed with his grievance unless and until the civil action which he had initiated against the Employer was withdrawn. In point of fact, Manton wrote to Horton's counsel on October 28, 1992 and advised:

"...We have been instructed to file a grievance on Mr. Horton's behalf for wrongful dismissal.

We will not be able to proceed in this matter until we have confirmation from you that your firm has been discharged."

As a consequence, the court action against Adbly Transport Ltd. was discontinued and a grievance, seeking reinstatement with full seniority benefits and compensation for time lost, was filed on Horton's behalf on December 8, 1992. On the same day, Mr. Tim McCullough, the Employer's Branch Manager, responded by memo to the Employees' Association and advised:

"...In conclusion, I feel that Mr. Horton has no case and if the Adbly Employees' Association wishes to pursue this grievance, it will most certainly have to be settled by my superiors or by arbitration."

Following this exchange of memoranda, a meeting was held with Horton on December 18, 1992, at McCullough's office. Manton, Herb Kotyk and Terry Beaudry represented the Employees' Association. The upshot of the meeting was that McCullough refused to change the position stated in his memorandum of December 8th and suggested the Association see his superiors or alternatively file a grievance. McCullough then left the meeting room where Horton remained with the Employees' Association representatives. The ensuing discussion revealed that the three members were at odds as to whether or not the grievance should proceed to arbitration. Accordingly, it was decided that Horton himself would put to the Association's membership the question of whether or not the Association should proceed with the grievance. Horton left believing that a membership meeting would be called within two weeks.

Notwithstanding the agreement of the previous day, Manton sent a letter to Horton on December 19, 1992 stating, inter alia:

"The board did meet after the hearing on December 18, 1992 and concluded that it was our purpose to make a final decision on your case. We also concluded that it would not be proper to have your case presented at an association general meeting as the company would not be there to present its case and therefore the full argument would not be presented. It is the executive boards mandate to make decision in matters such as this and by not doing so we would not be fulfilling the duties we were elected to perform.

It is with sincere regret that this did not turn out more in your favor.

We wish you luck and hope that your future turns in a more positive direction."

That letter, surprisingly enough, was accompanied by another letter of the same date which Manton sent to the Employer, which read:

"The executive board of the Adby Employees' Association of Edmonton has met to review the evidence given in the grievance hearing held in Edmonton, Alberta on behalf of Mr. Malcom Horton. It is our unanimous decision that we do not have a strong case and we will not be requesting an arbitration hearing in this case and consider this matter closed."

The evidence presented by Manton and Kotyk reveals that although the Executive of the Employees' Association initially agreed to have the question of proceeding with Horton's grievance determined at a general membership meeting, they subsequently, in discussions amongst themselves, determined not to do so for essentially the following reasons:

(1) They accepted the Employer's argument that Horton's grievance was untimely, pursuant to Article

15 of the collective bargaining agreement. They did not question McCullough's opinion, nor did they review, or have reviewed by counsel, the contents of the collective agreement. Both indicated, at the hearing, that they now believe McCullough's representation to be incorrect and that there is no time limitation which prohibits the grievance of Mr. Horton being pursued.

(2) They believed, as indicated in the letter to Horton of Dec. 19, 1992 that: " ...it would not be proper to have your case presented at the association general meeting as the company would not be there to present its case..." .

(3) They believed that the speeding infractions were serious enough to warrant the Employer's action. They admit, nevertheless, that they were unfamiliar with the concept of progressive discipline or the manner in which it should be invoked particularly in dismissal situations.

III

A bargaining agent's duty of fair representation is statutorily expressed in section 37 of the Code:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R.

509, established the following criteria which should be adhered to by a bargaining agent when handling grievances:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

- 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
- 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
- 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
- 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
- 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527)

An employees association's duty of fair representation is the necessary corollary of its right to exclusive representation of the employees in the bargaining unit. Because an employee who joins such an association forfeits his or her individual rights, the association, regardless of its level of sophistication, has a clear duty to represent fairly all of its members in grievance situations.

Where the grievance involves a dismissal, the union's obligation to represent the employee will be of a much

higher standard. In such cases, the decision not to process the grievance must be based on a careful and informed study of, and conscientious attention to, the substance of the case; see Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); and André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319).

IV

We are urged, by Mr. Manton who argued on the Association's behalf, not to impose too high a standard on local officials who act voluntarily on behalf of small unsophisticated unions, which, even if they lack expertise, provide a harmonious working environment for their members. During argument, Mr. Manton raised for the first time that one of the Association's objectives, in acting as it did, was to maintain a harmonious working relationship with the Employer.

We will deal first with Mr. Manton's argument that the Association's decision was inspired, at least partly, by its concern to maintain a harmonious relationship with the Employer.

The right to process a grievance is reserved to the union, and, in deciding to do so, it maintains considerable discretion. In exercising that discretion the union must take into consideration the sometimes competing interests of the employee, on the one hand, and those of the union, on the other. One of these considerations could well be the legitimate interest of the bargaining unit as a whole in

maintaining a harmonious working relationship with the employer weighed against the adverse effect that proceeding with the grievance would have on that relationship.

For example, during collective bargaining, the union will sometimes find it necessary to sacrifice a specific grievance, or group of grievances, in exchange for concessions from the employer that will be incorporated into the collective agreement, and therefore benefit the bargaining unit as a whole.

Although in weighing these considerations and reaching its conclusions the union is given considerable discretion (see Gagnon, supra), that discretion is not unfettered. In Centre Hospitalier Régina Ltée, [1990] 1 S.C.R. 1330, the Court addressed the question of the union's abandonment of a grievance in exchange for concessions from the employer during collective bargaining. Madame Justice L'Heureux-Dubé observes:

"As Gagnon pointed out, even when the union is acting as a defender of an employee's rights (which in its estimation are valid), it must take into account the interests of the bargaining unit as a whole in exercising its discretion whether or not to proceed with a grievance. The union has a discretion to weigh these divergent interests and adopt the solution which it feels is fairest. However, this discretion is not unlimited. Simply saying that the union has the right or power to 'sacrifice' any grievance, which it feels is valid at that stage, during negotiations with the employer, in order to obtain a concession of better working conditions or other benefits for the bargaining unit as a whole, would be contrary to the union's duty of diligent representation of the employee in question. On the other hand, completely rejecting the possibility that the union and the employer may settle a great many grievances in negotiations for a new collective agreement, or on other occasions, would be to ignore the reality of labour relations.

...

The exercise of this discretion by the union will also depend on the nature of the rights which the employee is seeking to enforce by his grievance. There will be situations where the abandonment of an apparently valid grievance by the union will have such consequences for the employee in question that it will substantially restrain the union's discretion. When, for example, the purpose of the grievance is to challenge a dismissal, the employee will not accept any half measures: only reinstatement will be a suitable remedy. Some have suggested that in such a case the union has no discretion and the employee's right to have his grievance arbitrated is absolute.

...

Accordingly, without necessarily accepting this statement in absolute terms, a union must recognize the importance of an employee's individual interest when exercising its discretion whether or not to proceed with a grievance against a dismissal or disciplinary sanctions."

(pages 1349; 1351; and 1352)

Dismissal is commonly referred to as the "capital punishment" of employer discipline. Once invoked, an employee's final, and often only recourse, is grievance arbitration, where an independent tribunal determines the propriety of the dismissal action taken. There may well be legitimate reasons for a union to conclude that a specific dismissal grievance does not warrant proceeding to arbitration. However, when weighing the competing interests, referred to in Gagnon, supra, it is difficult to understand, in dismissal situations, how any concession gained by the union in sacrificing the grievance solely for the purpose of maintaining its relationship with the employer, could assist the interests of the employee in question. After all, he or she would no longer be present in the unit to enjoy the fruits of those concessions, regardless of what they might be.

A union may well be permitted, in appropriate circumstances at the bargaining table as per Centre Hospitalier Régina Ltée, supra, to trade off a grievance in exchange for concessions of better working conditions or benefits for the bargaining unit as a whole. It is another matter where, as in this case, the association argues the right to abandon the dismissal grievance, during the currency of the collective agreement, in exchange for the somewhat amorphous concession of maintaining a harmonious working relationship with the employer.

In our view, if the union intends to invoke concessions to the general membership as a rationale for abandoning an employee's dismissal grievance (outside of the context of collective bargaining) it must, in addition to meeting the representational requirements in Gagnon, be in a position to clearly demonstrate that the concession obtained justifies the abandonment of the employee's individual interest - in this case, his job.

If in fact Horton's grievance was sacrificed for the purpose of maintaining a harmonious relationship with the Employer, it was done not only without obtaining any concession from the Employer, but also without appropriate regard for, or recognition of, the importance of Horton's individual interests in pursuing it. The Board therefore cannot give effect to the Association's argument in this regard.

In its alternative argument, the Association concedes that it may have acted erroneously and with a lack of expertise, even ineptness. However, it argues that its decisions were taken in good faith, that they were

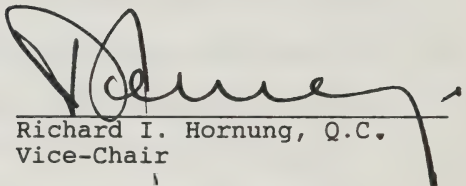
arrived at honourably, fairly and without any discriminatory considerations and that they are therefore not in breach of section 37. We accept that the Association's officials acted in good faith and without discrimination; however, the duty of fair representation is not discharged solely by proof of good faith; (see Tom Forestell and Randall Hall (1980), 41 di 177; and [1980] 3 Can LRBR 491 (CLRB no. 265)). Simply put, we cannot accept as fair representation what amounts, essentially, to a total lack of representation.

By the admission of its Executive members, the Association had not turned its mind to the grievance process in the Collective Agreement, nor did it understand the redress available to Horton under the terms of the agreement. Even if well meaning, the actions of the Executive committee in refusing to proceed with a dismissal grievance, based on what it now concedes was an erroneous interpretation of the collective agreement, without any proper understanding or appropriate review of the rights available to the Association or employee under that agreement, amounted to conduct that was clearly arbitrary and in breach of section 37.

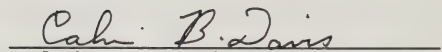
In the circumstance we allow the complaint. The Board hereby orders, pursuant to section 99(1)(b) of the Code, that:

1. The Association proceed to arbitration with the grievance in question forthwith;
2. Any time limits under the collective agreement which might be a bar to the arbitration are hereby waived;

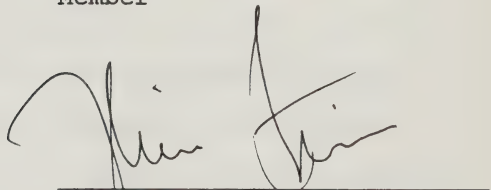
3. The complainant, Horton, is entitled to be represented by independent counsel of his choosing for the purposes of the arbitration. The Association is directed to pay all reasonable legal fees and expenses for such representation;
4. In the event Horton succeeds in his arbitration, the question of what compensation, if any, payable to Horton for the period between the date of his termination and the date of this decision shall be left for the arbitrator to determine;
5. The Board will retain jurisdiction with respect to the implementation of this order.



Richard I. Hornung, Q.C.
Vice-Chair



Calvin B. Davis
Member



François Bastien
Member

DATED at Ottawa this 10th day of June, 1993.

Information

CAI
L100
-I 52

This is not an official document.
Only the Reasons for Decision can
be used for legal purposes.

Ce document n'est pas officiel. Seuls
les Motifs de décision peuvent être
utilisés à des fins juridiques.

Summary

Michel Collard, applicant, VIA Rail
Canada Inc., employer, and Labour
Canada, interested party.

Board File: 950-248

Decision No.: 1016

Résumé de Décision

Michel Collard, requérant, VIA Rail
Canada Inc., employeur, et Travail
Canada, partie intéressée.

Dossier du Conseil: 950-248

Décision n° 1016

These reasons deal with the referral
of a safety officer's decision
following a refusal to work of a VIA
Rail employee, Mr. Michel Collard.
In his view, his protective equipment
against noxious inhalations from
industrial glues was inadequate.

Two preliminary matters are initially
discussed: The issue of timeliness
with regard to referral decisions and
the absence of the applicant at the
start of the hearing.

After reviewing the reasons and the
circumstances of the safety officer's
decision, namely with respect to his
stated intent to restrict his enquiry
to the equipment itself, the Board
confirms the officer's decision. It
notes that if the officer's enquiry as
defined in section 129 must be as
complete as possible, it cannot be
isolated from the notion of
immediate danger to which it must
put an end in the manner prescribed
in the Code.

Les présents motifs traitent d'une
demande de renvoi d'une décision
d'un agent de sécurité suite au refus
de travailler d'un employé de VIA
Rail, M. Michel Collard. Selon lui,
son masque ne le protégeait pas
adéquatement des vapeurs de colle
qu'il devait appliquer.

Le Conseil dispose d'abord de deux
questions préliminaires: le délai à
respecter dans les cas de demande de
renvoi et l'absence du requérant à
l'ouverture de l'audience.

L'analyse par le Conseil des raisons et
des circonstances de la décision de
l'agent de santé et sécurité,
notamment de l'intention de celui-ci
de s'en tenir précisément à l'objet
même du refus, l'amène à confirmer
cette décision. Le Conseil note que si
l'enquête de l'agent définie à l'article
129 doit être la plus complète
possible, elle ne peut manquer de
s'inscrire dans l'optique d'un danger
immédiat auquel elle est censée
mettre fin selon le mécanisme prévu
au Code.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for Decision

Michel Collard,
complainant,
and
VIA Rail Canada Inc.,
employer,
and
Labour Canada,
interested party.
Board File: 950-248

The Board consisted of Mr. François Bastien, Member, sitting as a single member in accordance with section 156(1) of the Code.

Appearances:

Mr. John Merritt, System Health and Safety Legislative Coordinator, CAW-TCA-Canada, for the complainant;
Mr. André Lamer, Safety Officer;
M^e Anne Cartier, Counsel for VIA Rail Canada;
Mr. Daniel Rainville.

The Board heard the parties at Montréal on March 15, 1993, as well as the safety officer whose report is the subject of this reference.

This case deals with the reference of a security officer decision filed pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health). The reference was made following a refusal to work by an employee of VIA Rail Canada Inc. (VIA Rail), Michel Collard, on October 1, 1992.

I

The employer objected, via counsel Anne Cartier, to the reference as soon as it was filed, because it was allegedly untimely. At the hearing, the applicant testified that he had received the safety officer's report by registered mail some 10 days at the earliest following its issuance. The request for reference was sent to the safety officer, André Lamer, on October 26, who then sent it to the Board on November 2, 1992. Since no official proof of the date of receipt of the report was provided at the hearing, the Board took that objection under advisement while awaiting that the proper verification be made at the Canada Post Corporation. The Board was recently advised that the applicant had in fact received the said report on October 20, 1992.

The other preliminary issue the Board had to address at the beginning of the hearing deals with the applicant's absence. The union representative, who was acting on behalf of the applicant, explained to a surprised Board panel that the union did not believe that Mr. Collard need be present and that, in any case, he did not intend to call him to testify. Following discussion, the Board ruled that the process provided for in section 130 in reference cases being that of a summary inquiry, it would therefore be unusual, not to say unseemly, to carry out an inquiry without the main player's participation. The Board decided to adjourn the hearing which resumed as soon as the applicant appeared before it.

II

The facts in this case are essentially unchallenged. The applicant, Michel Collard, is a VIA Rail employee assigned to the company's maintenance centre in Montréal. On the day

of his refusal, the applicant's work consisted of applying "Contact" glue to panels and carpeting in the shop. At the start of his shift, he exercised his right to refuse to work because his mask did not adequately protect him from fumes of the three types of glue he uses. Mr. Collard told the Board that the day before he had suffered from headaches and eye trouble allegedly because of those chemical products.

The employee, in accordance with the requirements of section 128 of the Code, had duly reported to his employer the circumstances of his refusal and advised the representative of the health and safety committee, Richard Brosseau. During the inquiry, the health and safety co-ordinator, Rafat Massad, offered Mr. Collard a full mask to replace the half mask in his possession. However, the new mask was not airtight because his glasses prevented proper adjustment. Mr. Massad then told him that the company would provide him with a mask with built-in glasses. Mr. Collard did not resume work before André Lamer, the Labour Canada safety officer, had carried out an inquiry.

As reported, the officer found that the mask was adequate, that is, it covered the whole face, that the cartridges used were suitable for organic fumes, and that the employee had received minimal training on the use of the mask; he then concluded that there was no danger.

The testimony of the safety officer, Mr. Lamer, concerning the inquiry, reveals the following information.

The officer asked the technical services of his department about the types of cartridges to use in order to assess the airtightness of the mask. Once on location, he checked the containers and the material safety data sheets provided by the employer. He did not deem it necessary to take air

samples nor to check the ventilation system, since the refusal in this particular case dealt with the mask's inadequacy. Nor did he examine the applicant's work during the preceding days since he was dealing with an imminent danger.

During the inquiry, he indicated to the union's health and safety representative, Richard Brosseau, that the union's concerns with long-term effects of the fumes of these products could be the subject of a complaint filed with Labour Canada, in which case an investigation could be carried out by a competent expert. Finally, he remarked on the insufficient training given to the complainant on the protection of the mask and, consequently, obtained from the employer a promise of voluntary compliance.

The complainant, for his part, testified that he had refused to work as soon as his shift started. Furthermore, on that day, he had not done any work that would have involved using any of the products in question. Finally, he had not demanded first aid treatment when he had suffered from headaches.

III

The Board's power with respect to the reference of safety officer decisions is defined in section 130(1) of the Code.

"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."

This power is in keeping with the general scheme of Part II of the Code and is not meant as a substitute to replace the officer's inquiry, but instead as a way to maintain its integrity and scope. Thus, the inquiry process is re-opened and reviewed as to the facts and reasons for the decision with all interested parties present.

But the reference procedure differs appreciably from the officer's inquiry process in terms of its primary focus. As the Board stated recently in Dennis C. Atkinson (1992), as yet unreported CLRB decision no. 958:

"... If the safety officer decides under section 129(5) that there is no danger within the meaning of the Code, the employee may require the decision to be referred to the Board. It is that decision, its 'circumstances' and 'the reasons therefor,' that the Board is called upon to review and confirm or not under section 130(1), not specifically the original perception of danger by the employee who triggered the whole thing, although the latter is obviously the key circumstance in the whole matter leading up to the investigation."

(pages 12-13)

On this subject, see also Alan Miller (1980), 39 di 93; [1980] 2 Can LRBR 344; and 80 CLLC 16,048 (CLRB no. 243).

In this case, the Board must assess the facts and reasons for the decision as a whole in order to decide if it should confirm or not that decision.

IV

In support of the reference, the union representative submitted that the officer's decision is based on a partial inquiry. According to them, the officer had not examined all issues relating to the assessment of danger, nor used all the proper tools before making a no-danger

determination. He pointed out in this regard that the officer had not taken air samples, nor asked the applicant specific questions concerning his working conditions before the refusal.

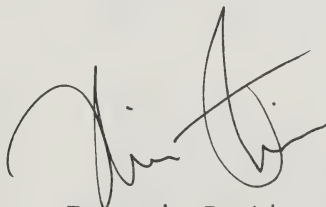
The Board examined closely all evidence on the applicant's claims. It finds that officer Lamer's inquiry dealt with the specific reason for Mr. Collard's refusal, that is, the mask's inadequate protection. Mr. Lamer explained to the Board that the questions of ventilation, air samples, etc., were not taken into consideration since they had nothing to do with the cause of the refusal. In addition, it is important to note, the comment made by Mr. Lamer to the health and safety representative, Mr. Brosseau, about bringing to Labour Canada's attention the long-term effects of the fumes of these chemical products if such was his concern. In fact, the safety officer, while recognizing that concerns on the long-term effects of these products may exist, decided for the purposes of the inquiry on the refusal to work to restrict himself to the reason for the refusal.

This procedure, the Board readily recognizes, complies with the general scheme of the Code and its own case law on this matter. In fact, the right of refusal constitutes but a part of the structure of Part II of the Code that is aimed at protecting the health and safety of workers, and remains well outlined as the Board stated in Atkinson, supra (pages 9-11). This is one of the reasons the Board's case law insists on the fact that this procedure must not constitute the preferred way to promote a healthy and safe environment (see David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686), pages 225-226; and 317-318; and Rosario Coulombe (1989), 78 di 52 (CLRB no. 747), pages 63-65).

Mr. Lamer's decision to restrict his inquiry to the particular circumstances of Mr. Collard's refusal, that is, the mask's inadequacy, was warranted. If the officer's inquiry as defined in section 129 must be as complete as possible, one must never forget that it cannot be isolated from the concept of imminent danger to which it must put an end, in accordance with the requirements of the Code.

In the instant case, Mr. Lamer acted promptly, made the necessary assessments with respect to the products and mask used, and ensured that the applicant would receive minimal training on the use of the mask. Nothing in the evidence adduced leads the Board to believe that any important elements have been omitted or processed wrongly or improperly.

The Board therefore confirms the officer's decision.

A handwritten signature in black ink, appearing to read 'François Bastien', with a large, stylized flourish at the end.

François Bastien
Member of the Board

DATED at Ottawa this 22nd day of June, 1993.

CAI
L100
-ISA

Information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Summary

Résumé

Karen Ashton, complainant, Canadian Union of Public Employees, Airline Division, respondent, and Time Air Inc., employer.

Karen Ashton, plaignante, Syndicat canadien de la Fonction publique (division du transport aérien), intimé, et Time Air Inc., employeur.

Board File: 745-4221

Dossier: 745-4221

Decision no.: 1017

Décision n° 1017

The complainant alleged that the union had breached its duty of fair representation in violation of section 37 of the Canada Labour Code (Part I - Industrial Relations) by allowing the time limits to refer a grievance to arbitration to expire.

La plaignante allègue que son syndicat a manqué à son devoir de représentation juste en violation de l'article 37 du Code canadien du travail (Partie I - Relations du travail) en laissant s'écouler le délai pour renvoyer un grief à l'arbitrage.

The Board found that the complainant's grievance was processed in a superficial manner following the replacement of a union representative who had initiated the grievance.

Le Conseil a jugé que le grief de la plaignante avait été traité de façon superficielle par suite du remplacement du représentant syndical qui avait déposé le grief.

The Board ordered that the time limits in the collective agreement be waived and ordered the grievance to arbitration.

Le Conseil a ordonné que le délai prévu dans la convention collective soit prorogé et que le grief soit renvoyé à l'arbitrage.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Karen Ashton,
complainant,
and
Canadian Union of Public
employees, Airline Division,
respondent,
and
Time Air Inc.,
employer.
Board File: 745-4221

The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. François Bastien and Ms. Evelyn Bourassa, Members.

Appearances:

Mr. Al Carmichael, for the complainant; and
Mr. Leo McGrady, accompanied by Mr. Govind Sundram, for the Union.

These reasons for decision were written by Ms. Evelyn Bourassa, Member.

I

On April 22, 1992, the complainant, Ms. Karen Ashton, filed an application before the Board alleging that her union, the Canadian Union of Public Employees, Airline Division, Local 4026, violated Section 37 of the Canada Labour Code (Part I - Industrial Relations) which reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The hearing dealing with the complaint was held in Edmonton on February 2, 3 and 4, 1993.

At the hearing, the Board heard the testimony of Ms. Ashton as well as one of the union representatives who had handled her grievance, Govind Sundram. The Board also heard the testimony of Gerald Miner, a CUPE National representative who has temporarily taken over Mr. Sundram's files. Also in attendance at this hearing was an observer appointed by the Company, Doug Brennan. Mr. Brennan did not participate in the hearing.

II

The complainant is a flight attendant with Time Air Inc. In accordance with the Ministry of Transport regulations, an air carrier must give each flight attendant recurrent training in all applicable emergency procedures at least once every 12 months. On July 11, 1991, Ms. Ashton failed by one percentage point to obtain a passing grade on a recurrent training examination administered by the Company. The complainant was given an opportunity to rewrite the examination. However, she was again unsuccessful in obtaining the required passing mark.

On July 23, the complainant was informed that she was being suspended from flying duties, without pay, for 3 days for failing to pass her recurrent training examination. On the same day, the complainant booked off sick. On July 25, at the request of her supervisor, she provided a medical certificate from her doctor stating that she would be unable to work for the period of July 23 to August 16, 1991.

At the beginning of her suspension, Ms. Ashton contacted

the Temporary National Representative of the Union, Tom Slade, for assistance. On or about July 25, 1991, Mr. Slade sent a letter to Marlene Egeland, Director, Inflight Service, seeking the concurrence in writing of the employer that the complainant would be considered as being off sick rather than suspended from flying duties. Mr. Slade's attempt to solve that matter was unsuccessful. On August 16, he received a copy of a letter dated July 26, 1991 from the Company addressed to the complainant. The letter stated that Ms. Ashton's request for sick leave was being denied on the basis that she was suspended from flight duties without pay until she had re-written and passed the initial flight attendant training final exam otherwise her employment with Time Air would be terminated.

It is at this stage that Mr. Slade responded by filing a grievance on behalf of Ms. Ashton. The grievance contested the employee's suspension without pay for lack of just and sufficient cause. Furthermore, it contested the accuracy of the examination marking and requested her reinstatement without loss of salary, seniority or any other privilege to which she may be entitled and finally requested that all reference to disciplinary measures and employee assistance program be removed from the employer's file.

The grievance was presented by Mr. Slade at Step I of the grievance procedure and, on August 21, 1991, the Company was provided with a six-page typed document outlining the Union's position with respect to Ms. Ashton's grievance. Four issues were raised in the position paper: 1) the complainant's suspension; 2) the denial of paid sick leave from July 23 1991; 3) the alleged harassment by her immediate supervisor; 4) safety issues. At Step I,

the employer upheld its decision and the grievance was referred to Step II in accordance with the grievance procedure in the collective agreement. The complainant testified that she was satisfied with Mr. Slade's way of handling her grievance during that time. She also stated that Mr. Slade who was working out of CUPE's office in Vancouver, was keeping her well informed of the developments occurring with her grievance.

At the beginning of September 1991, Mr. Slade's responsibilities as National Representative for Local 4026 were taken over by another union representative, Mr. Govind Sundram. Ms. Ashton was advised of this change on September 4 when she called Mr. Slade at his office. Mr. Sundram was with Mr. Slade at the time and the latter introduced him to Ms. Ashton during the conversation. Mr. Sundram advised her to contact her supervisor with respect to the recurrent training examination. The following day, she phoned Mr. Sundram who invited her to see him at the CUPE convention held in Winnipeg during the week of October 14, 1991. The complainant stated that when she met him at the convention, he did not have her grievance file in his possession and he appeared to be unfamiliar with its content. In contradiction with Ms. Ashton's evidence, Mr. Sundram told the Board that he had asked her what she was seeking and she had said that she only wanted to be paid for her days off on sick leave. He also stated that he talked to her about the technical difficulties relating to her grievance.

Meanwhile, Ms. Egeland, Director, inflight services, informed Mr. Sundram by letter dated October 11, 1991 that she, with the local component's President, Lisa Logodin, had tentatively set a Step II grievance meeting for the morning of November 21, in Calgary. The complainant asked

to attend the meeting but her request was denied by a member of the local component executives, Vicki Strom. No reasons were put forth to justify the decision although it was admitted by Mr. Sundram that members were usually encouraged to attend their grievance meeting. For some reason unknown to the Board, the meeting was postponed until November 27, 1991. Ms. Ashton was not informed.

According to the complainant's testimony, the only other time that she received information about her grievance was on January 16, 1992. The subject of the telephone conversation was an issue which is not germane to this case. The complainant had attended a disciplinary interview in the presence of her immediate supervisor and a representative of the CUPE component two days earlier and wished to obtain some guidance. At the end of their conversation she enquired about her grievance. Mr. Sundram told her that he had some technical difficulties with it but offered no more explanation. She said she did not request more details at the time because she was very concerned about losing her job now that she had received a notice of disciplinary action. After that telephone conversation, the union did not communicate with her nor did she receive details on her grievance.

At the beginning of March 1992, she received from the Company copy of a letter dated February 24, advising CUPE component President, Lisa Logodin, that Ms. Ashton's grievance was considered to be abandoned without recourse based on the failure of the Union to meet the time limitations as outlined in the collective agreement. After receiving Time Air's letter, she filed her complaint with the Board as she became aware that the union had done nothing to help her following Tom Slade's departure and that it had allowed the time limits prescribed in the

collective agreement to lapse.

III

Mr. Sundram contradicts Ms. Ashton's testimony. He states that during the January 16 telephone conversation, he informed her that the union had decided not to proceed with the grievance to arbitration. He said that he had tried on many occasions since November 1991 to call her to inform her of the union's decision but was unsuccessful in reaching her. Mr. Sundram recognized that the January 16 call was initiated by her as it related to other matters.

In his testimony, Mr. Sundram stated that, with respect to the November 27 grievance meeting, he went to Calgary to attend a meeting with CUPE component executives for the upcoming round of negotiations. A researcher for CUPE was also attending the meeting. At about noon, Lisa Logodin told him there was a meeting with the Company at 13h00 to discuss sick leave changes and Ms. Ashton's grievance. No discussions took place before the meeting. He had no file on the grievance because it was the first time he had learned about the meeting. A postponement was not asked by the union. Present at the meeting were Lisa Logodin and himself for the union and for the employer, Doug Brennan, director of Human Resources, Marlene Egeland, and another unidentified person.

Mr. Sundram told the Board that three points were discussed at the meeting which lasted approximately one hour: a) the employer wished to settle an unfair labour practice filed by CUPE with this Board 2 years before b) it asked the union for the possibility of changing the content of the sick leave policy i.e. the way flight attendants were to obtain their sick leave and c) Mr.

Sundram asked that Ms. Ashton's sick leave be paid. The Company maintained its refusal to settle the grievance. He added that he and Lisa Logodin took a break in the middle of the meeting during which he told her that the complainant's suspension was not disciplinary and that they had no valid grievance before them. He added that Local executives were in agreement with his opinion when he met with them, on the same day, following the meeting.

In his testimony, Mr. Sundram affirmed that prior to November 27, he had called Mrs. Egeland on several occasions at Time Air offices in Calgary. The calls he said were made with a view to obtaining sick leave with pay on behalf of Ms. Ashton.

IV

As is often the case with conflicting evidence, the Board has no choice but to assess the credibility of the witnesses. Hence, the determination of this matter rests on which testimony, that of Ms. Ashton or Mr. Sundram, the Board will prefer. After a study of the testimony as well as the written submissions filed by the parties, the Board concludes that the complainant's version is more credible, however difficult the task proved to be in the instant case.

One reason for this conclusion stems from an examination of the B.C. Tel bills for the airline division of CUPE that were submitted in evidence by the union. The bills cover the period of August 1991 to January 1992. Calls made to the complainant or made collect by her to the Vancouver office appear. However, the documents clearly show that only one call was made to Time Air's office in Calgary. The date is September 9, 1991. Consequently,

the Board questions how Mr. Sundram could on several occasions, according to his testimony, call Mrs. Egeland, Director of inflight services with respect to Ms. Ashton's grievance. The answer which was provided was not satisfactory to the Board.

Mr. Sundram's version regarding the employer's letter of February 24 also caused the Board to question the conduct of the union. Mr. Sundram indicated that contrary to the employer's assertion contained in its letter, he did not think that time limits prescribed in the collective agreement to refer the matter to arbitration had lapsed.

Mrs. Egeland's letter dated February 24, 1992 addressed to Lisa Logodin was preceded by yet another letter from Mrs. Egeland addressed to Ms. Logodin. This letter dated December 19, 1991 sent pursuant to the November 27 meeting states that the employer is still awaiting clarification of the remedy sought in regards to the complainant's grievance. Mrs. Egeland adds that the time limits for the union to proceed with the grievance is prior to December 27. This letter clears any doubt the Board could still entertain concerning the numerous discussions which Mr. Sundram testified he had with Mrs. Egeland and his alleged attempts to settle the issues. Clearly, this letter demonstrates contrary to Mr. Sundram's testimony, that the employer had not yet been informed by the union of what it was seeking in the case of the complainant's grievance. Moreover, no actions were taken by the union following the employer's warning concerning the prescribed time limits. The employer's interpretation with respect to the delays was not questioned by the union either. Time limits were just allowed to expire.

The Board is convinced that Ms. Ashton's grievance was

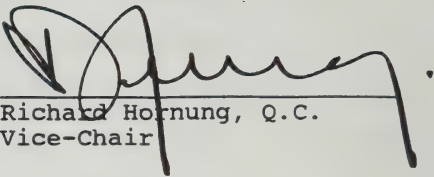
left unattended when Tom Slade was no longer able to process the grievance himself due to his departure at the end of August 1991. The facts that have been recited earlier need not be repeated. They demonstrate that the union did not turn a diligent and genuine mind to the grievance in the manner the Supreme Court of Canada has prescribed it has an obligation to do in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043. Instead, its attention to the matter was superficial, and perfunctory and as such in violation of Section 37 of the Code.

For all these reasons, the complaint is allowed.

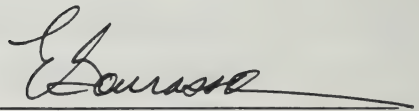
The Board has the power under Sections 99 (1) (b) and 99 (2) of the Code to determine the remedies to be applied in the case of a violation of Section 37. Accordingly, the Board orders the union to refer Ms. Ashton's grievance to arbitration and thereby waives all time limits established in the collective agreement relating to the submission of a grievance to arbitration. Any compensation that Ms. Ashton might be awarded by the arbitrator shall be borne by the union.

The Board will retain jurisdiction to deal with any question that may arise in connection with the implementation of this decision, including the making of specific orders if the need arises.

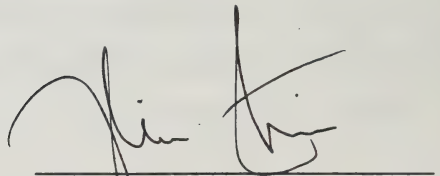
This is a unanimous decision.



Richard Hornung, Q.C.
Vice-Chair



Evelyn Bourassa
Member



François Bastien
Member

DATED at Ottawa this 28th day of June, 1993

CAI
L100
-ISS2

Information

This is not an official document.
Only the Reasons for Decision can
be used for legal purposes.

Ce document n'est pas officiel. Seuls
les Motifs de décision peuvent être
utilisés à des fins juridiques.

Summary

Résumé

Innotech Aviation Limited
Employees' Association, applicant,
and Innotech Aviation Limited,
employer.

Innotech Aviation Limited Employees'
Association, requérante, et Innotech
Aviation Limited, employeur.

Board File: 555-3533

Dossier du Conseil: 555-3533

Decision No.: 1018

Décision n° 1018



Section 24 of the Canada Labour
Code (Part I - Industrial Relations).
Employee association applied for
certification. Constitutional issue
raised. Activities of Innotech found
to come under federal jurisdiction as
they are closely connected with
aeronautics.

Article 24 du Code canadien du
travail (Partie I - Relations du
travail). Une association d'employés
a présenté une demande d'accrédita-
tion. La question de la compétence
constitutionnelle a été soulevée. Le
Conseil a jugé que les activités de
Innotech relevaient de la compétence
fédérale parce qu'elles sont
étroitement reliées à l'aéronautique.

This is an application for
certification filed by the Innotech
Aviation Limited Employees'
Association in respect of a group of
employees operating out of Dorval,
Quebec, and employed in
engineering, production and sales
functions. At the time of the
application, the applicant held a
provincial certification for the same
group of employees. In addition,
this Board had certified an
homonymous association for a
bargaining unit comprising
employees working out of the
company's facilities in Vancouver.

Il s'agit ici d'une demande
d'accréditation présentée par la
Innotech Aviation Limited Employees'
Association, visant un groupe
d'employés qui travaillent à Dorval,
au Québec, et qui sont affectés aux
services de l'ingénierie, de la
production et des ventes. Au moment
de la présentation de la demande
d'accréditation, la requérante détenait
une accréditation provinciale à l'égard
du même groupe d'employés. En
outre, le présent Conseil avait
accrédité une association d'employés
du même nom à l'égard d'une unité
de négociation comprenant des
employés qui travaillaient aux
installations de la compagnie à
Vancouver.

Having examined the aircraft
modification, completion and
maintenance activities of the
company, namely with respect to the
regulations to which these activities

Après avoir examiné les activités de
modification, de production et
d'entretien des aéronefs de la
compagnie, notamment en ce qui a
trait aux règlements auxquels ces

are subject in terms of aircraft airworthiness, the Board finds that, as in the case of Field Aviation Company Limited, another general aviation company declared by the Alberta Supreme Court (Appellate Division) to be a federal undertaking, these activities are so intimately connected with aeronautics as to constitute a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada. This means Innotech's labour relations come under the Canada Labour Code, and that this Board has jurisdiction to deal with the instant application.

activités sont assujetties en matière de navigabilité d'un aéronef, le Conseil juge que, comme dans le cas de Field Aviation Company Limited, une autre compagnie d'aviation qui a été déclarée entreprise fédérale par la Cour suprême de l'Alberta (Division d'appel), ces activités sont si étroitement liées à l'aéronautique qu'elles constituent une entreprise fédérale, relevant de la compétence exclusive du Parlement du Canada. Par conséquent, les relations de travail de Innotech sont assujetties au Code canadien du travail, et le Conseil a compétence pour s'occuper de la présente demande.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Innotech Aviation Limited
Employees' Association,

applicant,

and

Innotech Aviation Limited,
employer.

Board File: 555-3533

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. Robert Cadieux and François Bastien, Members.

Appearances

Mr. Christopher Deehy, accompanied by Messrs. Frank A. Scerbo and Derek Gavin, for the union;

Mr. Richard Martin, Director of Human Resources, accompanied by Mr. Florin Ciobotaru, for the employer; and

Innotech Aviation Limited Employees' Association (Richmond, B.C.), interested party.

These reasons for decision were written by Mr. François Bastien, Member.

This is an application for certification filed by the Innotech Aviation Limited Employees' Association in respect of a group of employees operating out of Dorval, Québec, and assigned to engineering, production and sales functions. At the time of the application, the applicant held a provincial certification for the same group of employees. In addition, this Board had certified the employee association for a bargaining unit comprising employees working out of the company's facilities in Vancouver..

It was on the basis of this situation that the Board notified the parties on April 16, 1993 that a hearing would be held in the instant case to deal solely with the constitutional aspect of the application. The hearing was held in Montréal on May 7, 1993.

I

The constitutional issue raised in the instant case is whether the activities Innotech Aviation Limited (Innotech) is currently engaged in are such that they are deemed to form part of aeronautics as defined in the Aeronautics Act, R.S.C. 1985, c. A-2, and related regulations, and as interpreted in the attendant case law. For if they are, it follows that they come under the constitutional authority of the federal government.

Indeed, a review of the judicial authorities makes it clear that the federal government enjoys exclusive jurisdiction over aeronautics. One of those authorities stated that Parliament had authority on the

"... granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences... The regulation, identification, inspection, certification and licensing of all aircraft; and ... The licensing, inspection and regulation of all aerodromes and air stations."

(Reference re Aeronautics in Canada, [1932] A.C. 54, pages 65 and 69)

The Alberta Supreme Court (Appellate Division) in Field Aviation Company Limited v. Alberta Board of Industrial Relations and International Association of Machinists and Aerospace Workers, Local Lodge 1579, [1974] 6 W.W.R. 596, provides a good overview of the regulatory framework

pertaining to air transportation. In its judgement, the Court described the activities of Field Aviation Company Limited as follows:

"... The company's business at Calgary is essentially that of aircraft servicing, maintenance, repair and overhaul, orientated heavily towards business-type aircraft. It is authorized by the Department of Transport of Canada to 'service, maintain, inspect, incorporate approved modifications, repair and overhaul' a wide range of fixed and rotary wing aircraft. ... The company also provides 'ramp' services, that is to say, it stores and refuels aircraft."

(page 598)

Justice Sinclair J.A. at the end of his examination of statutory and regulatory provisions governing the issuance of permits referred to above concluded as follows:

"As regards Canadian aircraft, two of the key sections of the Air Regulations are s. 200, which provides that no person shall fly an aircraft in Canada unless it is registered under the Regulations, and s. 204(1)(b), which says that no aircraft shall be registered unless there is in force in respect of the aircraft a certificate of airworthiness or a flight permit.

...

After reading all of these Regulations and Orders, one is struck by the concern shown for ensuring proper standards of aircraft servicing, maintenance, inspection, modification, repair and overhaul. And one is impressed with the importance of the role played by aircraft maintenance engineers, a role linked to that played by flight crews and by air controllers, all of whom are involved in the safe operation of aircraft, and who are accordingly required to be licensed.

In my opinion the evidence discloses that the Calgary operations of Field Aviation Company Limited are so intimately connected with aeronautics as to constitute a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada. The services performed by the company, and accordingly by its employees, are an essential part of the field of aeronautics."

(page 606)

II

The facts of the present case gathered from the material filed with the Board and the testimony of the company's Senior Director of Technical Operations, Florin Ciobotaru, can be summarized as follows. Innotech is a company headquartered in Montréal with operations in Toronto, Montréal, Vancouver and Ottawa. It describes its business as that of general aviation, particularly business, government and commercial flying. Its divisional structure reflects what the company terms its "full-circle" approach to aviation, namely the interrelated and integrated functions of aircraft sales, modification, completion and maintenance. The Aircraft Sales Division is located in Toronto, while aircraft modification, completion and maintenance are carried out in Montréal and Vancouver. Ottawa represents, from a corporate perspective, a unique situation in that it is solely dedicated to remote-sensing activities such as scan or photography shots of the environment in response to oil drifts, forest fires, etc.

For the purposes of the present application, there is a need to identify more precisely the nature of the activities of the employer carried out of the Dorval Airport under the broad functional headings of aircraft modification and completion, and aircraft maintenance.

Modification and completion activities involve engineering, manufacturing, installing and testing tasks on custom interiors and avionics packages. All components installed must meet stringent engineering standards. At the base in Montréal, civil and military aircraft (up to airline size) undergo systems upgrading and major repairs to damaged fuselages, control surfaces and subsystems. Work related to aircraft modification and completion, which account by far

for the largest share of Innotech's overall manpower utilization, is subject to authorization and approval by Transport Canada under the Aeronautics Act and related regulations.

The approval process is based on the carrying out of ground and flight functional tests by the company, following which documents are submitted to the proper regulatory authorities. Upon issuance of the approval notice, authority is given to operate the aircraft. In the case of U.S.-registered aircraft which represent a very significant portion of Innotech's customers, approval is first granted by the Canadian federal authorities, following which a recommendation is issued to the U.S. Government whose responsibility is to certify and release the aircraft to customers.

As regards the aircraft maintenance function, the range of services performed include routine line examination, major inspections and x-ray analyses, and complete overhauls to hydraulic, electrical, avionic and airframe systems.

Work performed must meet the high standards demanded by customers, manufacturers and regulatory authorities both in terms of the material used and the workmanship required. On the regulatory aspect, it should be noted that aircraft maintenance engineers like flight crews and air traffic controllers whose responsibility is the safe operation of aircraft, are required to be properly licensed by the Departments, as set out in section 404 of the Air Regulations, C.R.C. 1978, c. 2, issued under the Aeronautics Act. Innotech employs such licensed personnel for its maintenance function.

III

Decision

The activities of Innotech present strong similarities with those ascribed to Field Aviation Company Limited in the Alberta Supreme Court's decision referred to earlier. Indeed, if one excepts the aircraft servicing and ramp services which were provided by Field Aviation Company Limited, but are not in the case of Innotech, both companies can be thought of as being in the business of aircraft servicing, repair, overhaul and modification. To the extent that all these tasks must meet stringent standards in terms of aircraft airworthiness, they come within the highly regulatory purview of the Aeronautics Act and its numerous attendant regulations. Or, in other words, the procedures involved in carrying out these tasks remain under the federal regulatory authority as it is incumbent upon that authority to certify aircraft and aircraft components as being serviceable and airworthy.

What follows is that Innotech's activities are, in the words of the Field Aviation Company Limited decision, supra:

"... so intimately connected with aeronautics as to constitute a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada. ..."

(page 606)

As well, this means that the company's labour relations come under the Code and that this Board has jurisdiction to deal with the instant certification application.

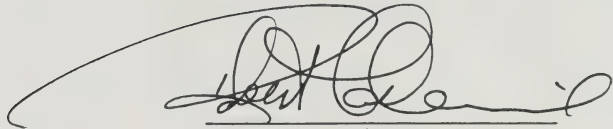
As for the certification itself, the Board will be issuing an order to the applicant for a unit comprising:

"all employees of Innotech Aviation Limited in Dorval working in engineering, production and sales, excluding foremen, supervisors and those above, office personnel, handymen, stress and avionics engineers."

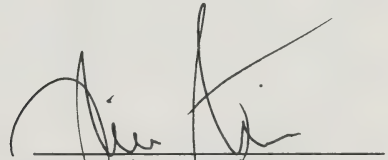
This is a unanimous decision of the Board.



Louise Doyon
Vice-Chair



Robert Cadieux
Member of the Board



Francois Bastien
Member of the Board

ISSUED at Ottawa, this 29th day of June 1993.

CLRB/CCRT - 1018

Information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Summary

Résumé

Richard Brassard, complainant, the Brotherhood of Maintenance of Way Employees, respondent, and Canadian National, mis-en-cause employer

Richard Brassard, plaignant, la Fraternité des préposés à l'entretien des voies, intimée, et Canadien National, employeur mis en cause.

Board file: 745-4334

Dossier du Conseil:
745-4334

Decision no.: 1019

Décision n° 1019

This decision deals with a complaint of breach of the duty of fair representation filed pursuant to section 37 of the Canada Labour Code (Part I - Industrial Relations). The complainant criticizes the union for not bringing his dismissal grievance to arbitration. He is also criticizing the union for not taking into account the fact that his disciplinary record was unblemished and that the foreman should have been more accountable than him in the matter.

La présente décision porte sur une plainte de manquement au devoir de représentation juste présentée en vertu de l'article 37 du Code canadien du travail (Partie I - Relations du travail). Le plaignant reproche au syndicat de ne pas avoir porté à l'arbitrage son grief de congédiement. Il lui reproche aussi de ne pas avoir tenu compte de son dossier disciplinaire vierge et du fait que la responsabilité de son contremaître aurait dû être plus grande que la sienne.

The union objects to the complaint on two grounds: first, that the complaint was not filed within the time limits set in section 97(2) of the Code; second, that the complaint is without merit.

Le syndicat conteste cette plainte pour deux motifs: le premier est que la plainte n'a pas été présentée dans le délai prévu au paragraphe 97(2) du Code; le second est que la plainte est mal fondée.

The time limits

Les délais

The Board, after considering the information on file and the various testimonies, concludes that the letter of the system's president general informing the complainant that his grievance would not be referred to arbitration

Le Conseil, après analyse du dossier et des différents témoignages, en vient à la conclusion que la lettre du président général du réseau informant le plaignant qu'il ne portait pas le grief à l'arbitrage ne peut être considérée comme

cannot be used as the starting point to calculate the time limits set in section 97(2) of the Code. As a matter of fact, the complainant received additional information from his local representative which led him to believe that his case was still under study and that his union continued to make the necessary efforts to defend him.

The merits

The Board, in a duty of fair representation complaint, considers the union's attitude and seeks to find out if this attitude is discriminatory, abusive or in bad faith with regards to the nature of the complaint and the measures taken by the bargaining agent. The Board does not decide if a decision made by a union is good or bad, with or without merit.

The analysis of the evidence shows that the union has taken into consideration the information contained in the complainant's file in its dealings with the employer.

The Board does not find in the union's attitude any arbitrariness which would lead it to conclude that the union violated section 37. The Board does however wonder what could be the reasons for a union's decision not to communicate directly with a member beyond the employer's investigation.

le point de départ pour calculer le délai du paragraphe 97(2) du Code. En effet, le plaignant a reçu des informations supplémentaires de son représentant syndical local qui lui ont laissé croire que l'examen de son dossier n'était pas terminé et que le syndicat continuait à faire les efforts nécessaires pour le défendre.

Le bien-fondé

Le Conseil, dans le cas d'une plainte de devoir de représentation juste, analyse l'attitude du syndicat et se demande si cette attitude a été discriminatoire, abusive ou de mauvaise foi, eu égard à la nature de la plainte et des démarches de l'agent négociateur. Le Conseil ne détermine pas si une décision prise par le syndicat est bonne ou mauvaise, fondée ou non.

L'analyse de la preuve démontre que le syndicat a tenu compte des renseignements au dossier du plaignant dans ses échanges avec l'employeur.

Le Conseil ne voit pas dans l'attitude du syndicat un comportement arbitraire qui pourrait amener le Conseil à conclure que le syndicat a violé l'article 37. Le Conseil s'interroge toutefois sur les raisons d'un syndicat de ne pas communiquer directement avec un membre au-delà de

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

It is obvious that in a dismissal grievance, a complainant who receives the ultimate penalty in labour relations matters has a right to be informed personally and on a regular basis of the progress of his case and of the reasons for the union's decision not to refer the grievance to arbitration.

l'enquête menée par l'employeur. Il est clair que dans un grief de congédiement, un plaignant qui se voit imposer la peine capitale en matière de relations de travail est en droit d'être informé personnellement et de façon régulière de l'évolution de son dossier et des motifs qui amènent le syndicat à ne pas porter le grief de congédiement à l'arbitrage.

Reasons for decision

Richard Brassard,
complainant,
and
Brotherhood of Maintenance of
Way Employees,
respondent,
and
Canadian National,
mis-en-cause employer.
Board file: 745-4334

The Board consisted of Ms. Louise Doyon, Vice-Chair, and
Ms. Evelyn Bourassa and Mr. J. Jacques Alary, Members.

Appearances

Ms. Marie-Josée Lafontaine, for the complainant;
Mr. Marco Gaggino, for the Brotherhood of Maintenance of Way
Employees;
Mr. Eric Boucher, for Canadian National.

These reasons for decision were written by Mr. J. Jacques
Alary, Member.

I

This decision deals with a complaint of breach of the duty
of fair representation filed pursuant to section 37 of the
Canada Labour Code (Part I - Industrial Relations) against
the Brotherhood of Maintenance of Way Employees (BMWE or the
union), received by the Board on October 1, 1992. Richard
Brassard, the complainant, criticized the union for not
bringing his dismissal grievance to arbitration and for not
taking into account his unblemished disciplinary record and
the fact that the foreman was primarily responsible in this
matter.

The union challenged the complaint on two grounds: (1) the complaint was not filed within the time limits set out in section 97(2) of the Code; (2) the complaint is without merit. The relevant provisions of the Code read as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

...

97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

Counsel for Canadian National (CN) had stated in a letter dated March 25, 1993 that he would not appear at the hearing initially scheduled for April 1 and 2. And he was not present at the hearing held in Chicoutimi on June 21 and 22, 1993.

At the start of the hearing, the parties requested that the Board focus on the union's primary grounds for objection, that is, the untimeliness of the complaint. After hearing the parties' submissions, the Board considered it appropriate to hear the entire case before making a determination.

II

The Evidence

Complainant Brassard, a joiner, bridges and buildings, who had worked for CN since May 10, 1978, was dismissed on February 5, 1992 for accepting payment for hours not worked

that had been claimed on his behalf by his foreman, Roger Mercier. Three employees, including the foreman, were involved in this matter, and all three were dismissed.

On February 4 or 5, 1992, André Trudel, BMW General Chairman for Quebec, learned that the three employees had been suspended by their supervisor, Gaston Beaudoin. Mr. Trudel received confirmation of this information by fax on February 5, 1992. On the same day, he also received another document by fax setting February 12, 1992 as the date of the investigation of the three employees in question. During this time he was in communication with André Beaulieu, the local union representative, and with Roger Mercier.

On February 12, 1992, the three employees met with Mr. Trudel before the start of the investigation to assess the situation. At this time, Mr. Trudel advised the three employees to stick together and to give brief and specific answers during the investigation.

The group arrived at the interview for the scheduled time, but one of the employer representatives had not yet arrived, and the investigation was postponed until 10:30 am. The employer began by giving Mr. Trudel a supervision report, a copy of a videocassette, a copy of the time cards indicating the hours of work that had been claimed, a statement by the employer's two investigators, a copy of Mr. Brassard's statement signed in their presence on February 4, 1992, and a copy of Mr. Mercier's statement, also signed on February 4. On receiving these documents, Mr. Trudel requested an adjournment to discuss with the three employees the information provided by the employer. When the investigation resumed at around 1:30 p.m., Mr. Trudel requested another adjournment, until February 17, 1992, which he was granted.

The three employees and Mr. Trudel then went immediately to a video dubbing company to get copies of the videocassette for the three employees. They talked for about an hour while waiting for the cassettes. Mr. Trudel advised the three employees to look at the video again and to provide him with any comments before February 17, 1992. The next day, February 13, 1992, Mr. Trudel went to Ottawa to meet with Mr. Brown, the union's legal counsel, and with Ronald Bowden, BMW General Chairman.

The investigation resumed on February 17, 1992, and concluded with a notice of dismissal dated February 27, 1992, retroactive to February 5, 1992.

On March 19, 1992, the union took to the third step of the grievance procedure an objection to the disciplinary action imposed on Mr. Brassard. The union claimed that the foreman, and not Mr. Brassard, had falsified the time cards. It also objected to various parts of the investigation report.

On April 16, 1992, CN dismissed the BMW's appeal. Following receipt of this response, Mr. Trudel sent the complainant's complete file with comments to Ronald A. Bowden.

After examining the file, Mr. Bowden concluded that he could not pursue the grievance and informed Mr. Trudel of this decision on May 5, 1992, and sent copies to the complainant and the other two employees. On receiving this letter, Mr. Brassard immediately contacted André Beaulieu, his local union representative, with whom he had always dealt and had been in communication throughout the period of objection to his dismissal. Mr. Beaulieu advised Mr. Brassard not to worry and said that he would ask Mr. Bowden to reconsider his position. On June 11, 1992, Mr. Beaulieu sent a letter

to Mr. Bowden stating his concerns about Mr. Bowden's decision. He also sent him a decision by Employment and Immigration's arbitration board that supported Mr. Brassard's position.

On June 23, 1992, Mr. Bowden replied to André Beaulieu, reiterating his decision of May 5. In the meantime, on June 17, 1992, following a recommendation by his legal counsel, Mr. Bowden sent a letter on behalf of Mr. Brassard to CN stating that he would be presenting Mr. Brassard's case at the fourth step of the grievance procedure.

On October 26, 1992, CN dismissed the grievance.

III

Untimeliness of the Complaint

Section 97(2) of the Code stipulates that section 37 complaints must be made not later than 90 days after the date on which the complainant "knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint." According to the union, Mr. Bowden's letter of May 5, 1992 should be used as the starting point to calculate the time limits; otherwise, the starting date would be June 11, 1992, when it was evident that the complainant would have received the May 5, 1992 letter. Regardless of whether May 5 or June 11 is used, more than 90 days had elapsed between the time Mr. Brassard became aware of the union's decision and the time he filed his complaint.

The union attempted to demonstrate to the Board that the complainant should have known from the outset that it was Mr. Trudel, and not Mr. Beaulieu, who was responsible for

his case, as stipulated in the collective agreement. The General Chairman does in fact have the authority to file a grievance at the third step of the grievance procedure set out in the collective agreement.

Mr. Brassard said that he had been in close contact with André Beaulieu, his local representative. Mr. Brassard had been dealing with Mr. Beaulieu throughout this matter and therefore trusted Mr. Beaulieu when he said not to worry and to leave everything up to him following the May 5 letter. Mr. Brassard did not learn of the union's final position until about July 6, when he received a copy of the June 23, 1992 letter sent to Mr. Beaulieu. In his testimony, Mr. Mercier confirmed that the local union representative, Mr. Beaulieu, had told the three employees not to worry and to wait before doing anything.

After reviewing the information on file and the testimony heard, the Board concluded that the May 5, 1992 letter cannot be considered as the starting point to calculate the time limits set out in section 97(2) of the Code. In fact, Mr. Brassard had received additional information that could have led him to believe that the review of his case had not been completed, and that his union was continuing to make the necessary efforts to defend his case. In this matter, André Beaulieu, the local union representative, played a primary role. He served as liaison between the employees and the union and also asked the employees to disregard the information in the May 5, 1992 letter and to let him approach Mr. Bowden on their behalf. For this reason, the Board decided that it was on or about July 6, after receipt of the June 23, 1992 letter, that Mr. Brassard was informed that his union would not be taking his grievance any further. The complaint was filed on October 1, 1992, which was within the time limits set out in section 97(2) of the Code.

In Jean-Pierre Plante (1992), 93 CLLC 16,041 (CLRB no. 982), the Board recalled that the knowledge of the facts that prompt a complainant to file a complaint must be considered in relation to the knowledge that can be presumed to exist in a reasonably diligent person. When a union official clearly informs a union member that a matter has not been resolved and that he is continuing to defend the case, the member is allowed to trust his union representative and to expect to be informed of the results of the official's endeavours, as in this case.

IV

The Merits

When a section 37 complaint is referred to the Board, it considers the union's attitude toward the employees and assesses whether it is discriminatory, wrongful or in bad faith, in view of the nature of the complaint and the steps taken by the bargaining agent. The Board need not decide whether a union's decision is good or bad, with or without merit.

In this case, the complainant criticized his union for failing to distinguish between his case and that of the foreman in relation to the disciplinary action imposed on him by his employer. He also criticized the union for not emphasizing the fact that the complainant's disciplinary record had been unblemished since he had been hired, and for having dealt with the cases of the three dismissed employees as a single entity. He would have liked his case to have been considered separately so he could have given his union more information, which meant that an arbitrator could have concluded that the dismissal was too harsh under the circumstances, given his personal record.

The union claimed that, after reviewing the case law of the Canadian Railway Office of Arbitration, the employer's detailed response and all documents on file, including the videocassette, it decided that it had no chance of success at arbitration. Despite the employer's response at the third step of the grievance procedure and the fact that it felt he had no chance for success, it nevertheless took Mr. Brassard's grievance to the fourth step. The union concluded that it had not acted in an arbitrary manner toward the complainant.

An examination of the evidence indicates that the union took the special nature of Mr. Brassard's case into account in its dealings with the employer, particularly in its March 19, 1992 letter, in which it took Mr. Brassard's case to the third step of the grievance procedure.

The matter at issue here is the union's reason for informing the complainant that it would not be taking his grievance beyond the third step, whereas the file shows that the union took the grievance to the fourth step of the grievance procedure. The union claimed that its assessment of the file, the case law and the various opinions received supported this action after the employer's response of April 16. The Board does not see in this behaviour any arbitrary element that could cause the Board to conclude that the union contravened section 37. Because the Board need not rule on the merits of a grievance, it cannot condemn a union's attitude when it is in keeping with the procedures the union usually follows in handling grievances, as is the case here.

Although the union's decision does not contravene section 37 of the Code, the Board nevertheless notes that the union did not communicate with the complainant on a regular basis to inform him of the results of its dealings with the employer.

In a dismissal case, a complainant has the right to be informed personally and on a regular basis on how his case is progressing and on the union's reasons for not referring a dismissal grievance to arbitration.

The Board notes the parameters of the duty of representation outlined by the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

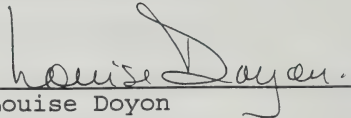
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

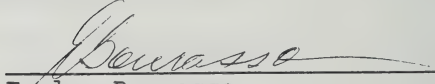
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

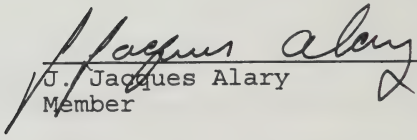
(pages 527; 654; and 12,188)

The Board finds that the union, in refusing to refer Mr. Brassard's grievance to arbitration, did not contravene section 37 of the Code.

For these reasons, the complaint is dismissed.


Louise Doyon
Vice-Chair


Evelyn Bourassa
Member


J. Jacques Alary
Member

ISSUED at Ottawa, this 5th day of August 1993.

CCRT/CLRB - 1019

information

Government
Publications

This is not an official document. Only the Reasons for Decisions can be used for legal purposes.

Summary

Council of Railway Unions, applicant, Canadian Pacific Limited, employer, and National Automobile, Aerospace Workers Union of Canada, intervenor.

Board file: 555-3451
Decision no. 1020

Section 32 of the Canada Labour Code - Application for certification filed by the Council of Railway Unions for a unit of shopcraft employees of the employer. The appropriate unit was established in Canadian Pacific Limited (1992), as yet unreported CLRB decision no 944, July 10, 1992.

The Board finds that the applicant is a council of trade unions under the provisions of section 32 of the Code. It represents six of the seven unions currently holding bargaining rights for the employees concerned, most of whom are members of one or another of the constituent unions. The Board considers them to be members of the council for the purposes of section 32(3) of the Code.

However, the Board exercised its discretionary powers and dismissed the application. The Board considered it significant that the union representing the railway carmen opposed the council and felt that the council's objective to maintain distinctions between crafts would not be in accordance with the objectives underlying the bargaining unit restructuring within the railway shops. Application rejected.

Board member Michael Eayrs dissented. He would have exercised the Board's discretion under section 32 of the Code in favour of recognizing the applicant for the purposes of a representation vote.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Conseil des syndicats ferroviaires, requérant, Canadien Pacifique Limitée, employeur, et Syndicat national des travailleurs et travailleuses de l'automobile de l'aérospatiale et de l'outillage agricole du Canada, intervenant.

Dossier: 555-3451
Décision n° 1020

Article 32 du Code - Demande d'accréditation présentée par le Conseil des syndicats ferroviaires visant une unité d'employés d'ateliers de l'employeur. L'unité habile à négocier a été déterminée dans Canadien Pacifique Limitée (1992), décision du CCRT n° 944, non encore rapportée, 10 juillet 1992.

Le Conseil juge que le requérant est un regroupement de syndicats au sens de l'article 32 du Code. Il représente six des sept syndicats actuellement détenteurs des droits de négociation des employés visés et la plupart de ces derniers sont membres de l'un ou l'autre des syndicats. Par conséquent, le Conseil considère qu'ils sont membres du regroupement au sens du paragraphe 32(3) du Code.

Toutefois, le Conseil exerce son pouvoir discrétionnaire et rejette la requête. Le Conseil trouve significatif l'opposition de l'unité des wagonniers au regroupement et considère que l'objet du regroupement de maintenir les distinctions entre les métiers va à l'encontre de l'objectif de réorganisation de la structure de négociation au sein des ateliers de chemins de fer. Demande rejetée.

Un membre du banc, Michael Eayrs, est dissident. Il aurait exercé le pouvoir discrétionnaire que confère l'article 32 du Code au Conseil en faveur du requérant, en vue de la tenue d'un scrutin de représentation.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Council of Railway Unions,
applicant,

Canadian Pacific Limited,
employer,
and

National Automobile, Aerospace
and Agricultural Implement
Workers Union of Canada,

intervener.

Board file: 555-3451

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Ms. Ginette Gosselin and Mr. Michael Eayrs, Members.

Hearings: Hearings were held in Montréal on September 10 and November 3, 1992.

Appearances: Mr. Abe Rosner, for the applicant;
Messrs. Marc Shannon and Denis Courcy, for the employer;
Mr. Steve Waller, for the National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW-Canada);

Mr. James Shields for the International Association of Machinists and Aerospace Workers;

Mr. François Côté and Mr. Jean Hurtubise, for the International Brotherhood of Electrical Workers;

Mr. Michael Church, for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and the International Brotherhood of Firemen and Oilers, the Sheet Metal Workers' International Association and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada;

The reasons for decision for the majority were written by

Mr. J.F.W. Weatherill, Chairman. Mr. Michael Eayrs
dissents; his reasons are appended.

I

In this application (as amended) the Council of Railway
Unions seeks certification as bargaining agent for the
following unit of employees:

*"All employees of Canadian Pacific Limited and its
subsidiaries employed in the Locomotive Department,
Car Department and Operating Department and
designated as Tradesman, Apprentice, Helper, Engine
Attendant and Shop Helper."*

That unit of employees was found to be appropriate for
collective bargaining in Canadian Pacific Limited, as yet
unreported CLRB decision no. 944, and we find it to be an
appropriate unit for the present case.

Where a council of trade unions applies for certification
as bargaining agent for a unit of employees, the usual
criteria respecting applications for certification (set
out in section 24 of the Code) must be met, but in
addition the Board has, under section 32 of the Code, a
discretion with respect to the certification of a council
of trade unions. In order to obtain the status of a
council of trade unions, an applicant must meet all the
minimum requirements imposed on an individual trade
union, and must have as its constituent bodies two or
more trade unions, each of which meets the test under the
Code for trade union status. The council must have the
appropriate authorization to act on behalf of its
constituent member unions. See Canadian Pacific Express
and Transport Ltd. (1988) 73 di 183 (CLRB no. 682) and
Purolator Courier Ltd. (1993), as yet unreported CLRB
decision no. 1003. The constituent trade unions are six
of the seven trade unions presently holding bargaining

rights in respect of the employees in the employer's shops. In the instant case, the applicant is, we find, a council of trade unions within the meaning of section 32 of the Code.

Two questions remain to be decided: first, the representative nature of the applicant among the employees in the bargaining unit and second, whether or not the Board should exercise its discretion under section 32 of the Code in favour of the applicant council.

The evidence of membership on which the applicant relies is that employees within the bargaining unit found to be appropriate are members of one or another of the Council's constituent trade unions. In this respect the applicant relies, correctly, on the provisions of section 32(3) of the Code. Virtually all of the employees in the existing bargaining units are members of the bargaining agents presently representing the employees in those units. These employees who are members of "Council" unions may, then, properly be considered members of the Council for the purposes of an application for certification.

The present application may be considered as being in the nature of a raid. Certainly there are existing bargaining agents, which the applicant seeks to displace, although those bargaining agents of course represent employees in the existing craft bargaining units, whereas it is the right to represent the employees in the new unified unit that, given our determination as to the appropriate unit in this case, is in issue here. The Board has held that a raiding trade union is not entitled to be placed on a representation ballot unless it can

establish that a majority of the employees in the bargaining unit are among its members: see CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151). The evidence of membership on which the applicant council relies in this case indicates that the applicant represents a majority of the employees in the bargaining unit, albeit a very slight majority.

Subject to the exercise of our discretion under section 32 of the Code, then, the applicant Council would be entitled to a place on a ballot in a representation vote, the parties to which would be the Council and the Canadian Automobile Workers, bargaining agent for the present unit of railway carmen who, as we have indicated, form an integral and very substantial part of the bargaining unit we have determined to be appropriate.

Having regard to all of the circumstances, we are of the view however that the Council ought not to be certified as bargaining agent for the new unified bargaining unit, and that our discretion under section 32 of the Code should be exercised against such certification.

Our reasons for this are analogous to those articulated by the Board in Canadian Broadcasting Corporation (1992), as yet unreported CLRB decision no. 954, where, as here, a council formed by certain incumbent trade unions sought to become bargaining agent for a unified bargaining unit which included groups of employees represented by constituent unions of the council, as well as other unions. In that case the Board considered the Constitution of the Council and concluded that its "fundamental rationality is geared to the current division of union jurisdiction among job classifications

and its preservation over time." The council's constitutional arrangements were found to have been "aimed indeed at bypassing or undermining the bargaining structure determined to be appropriate." Both an application for reconsideration of that decision, and an application to the Federal Court of Appeal for judicial review of that decision were dismissed.

In the instant case as well, it is our view that a fundamental purpose of the Council's structure is - quite understandably of course - the preservation of craft distinctions. This purpose is at odds with that of the bargaining unit restructuring which the Board has determined to be appropriate. The Council's structure is such as to make it responsive to the representational needs of the members, or most of the members, of its present constituent unions, and to the organizational needs of those unions themselves. But it is not organized in such a way as to maximize either effective negotiation or effective collective agreement administration for all employees coming within the industrial bargaining unit the Board has determined to be appropriate. It is significant as well that the largest of the present bargaining units, that of the railway carmen, opposes the Council. While the Council's Constitution contemplates the representation of carmen, as of course it must, it cannot be said that this group of employees - which is as we have said the largest group of employees in the new unified unit - would be represented in quite the same way as those holding membership in the constituent trade unions.


In Canadian Council of Broadcast Unions et al. v. Canada Labour Relations Board et al., judgment rendered from the bench, no. A-931-92, February 24, 1993, the Federal Court

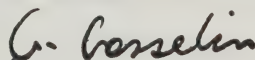
of Appeal dismissed an application for judicial review of the Board's decision in Canadian Broadcasting Corporation, supra. The Court confirmed that the Board did indeed have a discretion under section 32 of the Code, and with respect to the exercise of that discretion it said:

"[The Board] is entitled to look at the impact that the certification of the council of trade unions would have on the labour relations and the industrial peace in the workplace and on the well-being of the employees and their community of interest. In other words it may, as it has done in this case, assess the extent to which the certification will foster the broad industrial relations objectives underlying the rationalization and realignment of the bargaining structure. It can rely on such functional factors as the viability of the council, the ability of the council to act as a bargaining agent and the maintenance of the integrity and operation of the bargaining unit found appropriate by the Board pursuant to the realignment of the bargaining structure."

It is in the light of such considerations that the Board in the instant case has concluded that the certification of the Council would not be in accordance with the broad industrial relations objectives underlying the rationalization and realignment of the bargaining structure in the railway shops.

Accordingly, in the exercise of its discretion under section 32 of the Code, the Board dismisses this application, and will hold a representation vote among the membership of the bargaining unit.


J.F.W. Weatherill
Chairman



Ginette Gosselin
Member

DISSENTING OPINION OF MEMBER MICHAEL EAYRS

With respect, I cannot agree with the decision of the majority to exercise the Board's discretion (pursuant to section 32 of the Code) to dismiss the application for certification by the Council of Railway Unions (the Council).

I

I acknowledge that the Board does have discretion in applications involving councils of trade unions (as opposed to applications pursuant to section 24 by single trade unions) and I would, as the majority did, find that the applicant is a council of trade unions within the meaning of section 32 and that it did have the requisite membership to properly bring the instant application. I would, however, contrary to the decision of the majority, and for the following reasons, have exercised the Board's discretion in favour of the Council and thus entitle it to be placed on the ballot in a representation vote the parties to which would be the Council and the Canadian Automobile Workers (the CAW) for the bargaining unit created by Board decision no. 944 and described in the majority decision.

In a general sense, I see nothing in the Council's Constitution, as most recently amended and presented in the course of these proceedings, which would inhibit its ability to function as an effective bargaining agent for all employees in the single shopcraft bargaining unit for which it has applied. It has provided for proportional representation of its present (and future) constituent unions and has provided a ratification procedure which is based on a majority vote of all its members (without regard to the constituent unions from which their

council membership has been derived). It has, in my opinion, and contrary to the decision of the majority, positioned itself for both effective collective agreement negotiation and administration.

II

The majority has said that a fundamental purpose of the Council's structure is the preservation of craft distinctions and that such purpose is at odds with the Board's bargaining unit restructuring (giving rise to these proceedings). I believe the implication here is that (a) there is something inherently wrong with unions (faced with a restructuring to a single bargaining unit) attempting to remain in existence by forming a council (as in the instant case), and (b) that the net effect could result in a diminished ability for a council of trade unions (as opposed to a single union) to effectively deal with and resolve work assignment or jurisdictional disputes.

Firstly, there is, in my opinion, nothing wrong, per se, with unions attempting to preserve their existence either through establishment of a council or otherwise. It is quite natural that, as in the instant case, the six craft unions faced with a single bargaining unit have formed the Council. It is also quite natural that the Council so formed would then seek to become the sole bargaining agent for the unit and thus of necessity "raid" the CAW for the seventh unit (carmen) folded into the single unit created. In that regard, it should also be noted that the CAW, by supporting the establishment of a single unit and declining the Council's invitation to join it, and consistently opposing the Council's application to be on the ballot, could be seen to be not only interested in

preserving (but in fact, should it win the day) enhancing its existence. Again, there is no criticism implied, it is simply a fact of life that unions have, as one of their legitimate natural objectives, survival.

Secondly, with respect to problems arising from work assignment or jurisdictional disputes, I see nothing in its Constitution that would prevent the Council from effectively dealing with those that might arise.

More importantly in my opinion, this same panel of the Board in its (unanimous) decision no. 944 had this to say at pages 7 and 8:

"The company does, however, argue that in order to operate efficiently, it must have flexibility in assigning work, so that assignments may be made on the basis of ability and qualifications to perform tasks, unrestricted by what it considers to be the archaism of the 'craft rules' set out in each of the collective agreements.

Two comments should be made on what has just been said. First, the craft rules and any restrictions on what might otherwise be management's right to assign work are matters for collective bargaining, and such matters are now dealt with in the collective agreements. If the Board redefines the bargaining units in the manner sought in this application, that will not involve any determination with respect to assigning work. Second, there is no issue before us as to the requirement of accreditation within a craft for the performance of certain work. The assignment or work is, among other things, a function of skill and qualifications, and there is no doubt that for some work assignments to be properly made, the person to whom the work is assigned must be appropriately accredited within the appropriate craft. That requirement may simply arise from the nature of the work to be performed, or it may be imposed by law. This decision could not and does not deal with such matters."

(emphasis added)

In fact, the Council, properly constituted (as I believe it is) and, having assumed full responsibility for all collective bargaining matters might well prove to be a

more effective bargaining agent for the resolution of such matters. A council of shopcraft unions in one form or another has been functional for many years, initially as a certified bargaining agent and latterly as an ad hoc voluntary council. There was little evidence, during the section 18 proceedings giving rise to the instant case, that work assignment matters were a compelling reason to change the bargaining unit configuration. There is also no reason to believe that such matters would be more readily resolved were a single union (as opposed to the Council) with a large skilled trade component to become the bargaining agent.

The majority, in exercising its discretion, relies on Canadian Broadcasting Corporation (1992), as yet unreported CLRB decision no. 954. Its reasons for doing so are articulated in the majority decision and need not be restated here. With respect, however, I do not agree that the factors leading to the Board's exercise of discretion in that case (CBC) are present to any compelling degree in the instant case.

III

I have a further reason for not joining my colleagues in the majority. Although it may be seen as somewhat subjective and of necessity is based, to a certain extent, on speculation, I am concerned with the possible impact of the elimination of the Council on the representational wishes of the employees in the bargaining unit.

The Council has, in its Constitution, provided that in the event it became the bargaining agent, the CAW (during a limited time period) could join as a constituent member

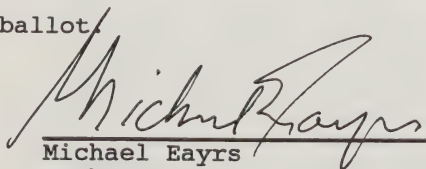
with all rights, privileges and proportional representation.

This provision would offer all employees voting, including CAW members, the opportunity to remain in their various "home" unions while being represented in collective bargaining by a single certified bargaining agent (the Council). Thus, in a sense, it may be said that the elimination of the Council from the ballot also eliminates, for a substantial number of employees, the option of voting for the union of their choice.

IV

Finally, while, pursuant to section 32, the Board does have discretion with respect to bargaining agents (if those agents are councils of trade unions), it is my opinion that such discretion should only be used to dismiss an application for certification by a council of trade unions where extremely compelling reasons to do so exist. In my respectful opinion the choice of bargaining agent belongs to the employees affected and in the instant case, there were not sufficiently compelling reasons for the Board to exercise its discretion against the Council, dismiss its application, and eliminate it from the ballot.

For the above reasons, I would have exercised the Board's discretion to order a representation vote with only the CAW and the Council on the ballot.


Michael Eayrs
Member

ISSUED at Ottawa this 26th day of July, 1993

Information

This is not an official document. Only the Reasons for Decisions can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Summary

Résumé

Council of Railway Unions, applicant, Canadian National Railway Company, employer, National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, intervenor.

Conseil des syndicats ferroviaires, requérant, Compagnie des chemins de fer nationaux du Canada, employeur, Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada, intervenant.

Board file: 555-3482

Dossier du Conseil: 555-3482

Decision no. 1021

Décision no 1021

Section 32 of the Code - Application for certification filed by the Council of Railway Unions for an amalgamated unit of shopcraft employees of the employer that the Board found to be appropriate in Canadian National Railway Company (1992), as yet unreported CLRB decision no. 945, July 10, 1992.

Article 32 du Code - Demande d'accréditation présentée par le Conseil des syndicats ferroviaires visant l'unité unifiée des employés d'ateliers de l'employeur jugée habile à négocier par le Conseil dans Compagnie des chemins de fer nationaux du Canada (1992) décision du CCRT n° 945, non encore rapportée, 10 juillet 1992.

The Board determined that the applicant is a council of trade unions for the purposes of section 32 of the Code. The Council represents five of the six unions that presently hold bargaining rights for the employees concerned, most of whom are members of one or another of these unions. Therefore, the Board considers them to be members of the council of trade unions under the provisions of section 32(3) of the Code.

Le Conseil juge que le requérant est un conseil de syndicats au sens de l'article 32 du Code. Il représente cinq des six syndicats actuellement détenteurs des droits de négociation des employés visés et la plupart de ces derniers sont membres de l'un ou l'autre de ses syndicats. Par conséquent, le Conseil considère qu'ils sont membres du regroupement au sens du paragraphe 32(3) du Code.

The membership evidence does not however indicate that the council of trade unions represents the majority of the employees of the bargaining unit. Accordingly, the application is dismissed.

La preuve d'adhésion, toutefois, ne démontre pas que le regroupement requérant représente la majorité des employés de l'unité de négociation. La demande d'accréditation est donc rejetée.

The Board would nevertheless have exercised its discretionary powers under section 32 to dismiss the application.

Le Conseil aurait néanmoins rejeté la demande du requérant en vertu de ses pouvoirs discrétionnaires prévus à l'article 32 du Code.

The Board considers it to be significant that the railway carmen oppose the council and feels that the council's objective to maintain the distinctions based on craft lines, is not in accordance with the objectives that underlie the bargaining unit restructuring within the railway shopcraft units.

Le Conseil trouve significatif l'opposition de l'unité des wagonniers au regroupement et considère que l'objet du regroupement de maintenir les distinctions entre les métiers va à l'encontre de l'objectif de réorganisation de la structure de négociation au sein des ateliers de chemins de fer.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Council of Railway Unions,
applicant,

Canadian National Railway Company,
employer,

National Automobile, Aerospace and
Agricultural Implement Workers Union
of Canada,

intervener.

Board File: 555-3482

The Board was composed of Mr. J.F.W. Weatherill,
Chairman, and Ms. Evelyn Bourassa and Mr. Robert Cadieux,
Members.

Hearings: Hearings in this matter were held at Montréal
on September 11 and November 4, 1992.

Appearances:

Mr. Abe Rosner, for the applicant;

Messrs. John A. Coleman and Alphonse Giard, Q.C., for the
employer, Canadian National Railway Company;

Mr. Steve Waller, for the intervener National Automobile,
Aerospace and Agricultural Implement Workers Union of
Canada (CAW-Canada);

Mr. James Shields, for the International Association of
Machinists and Aerospace Workers;

Messrs. François Côté and Jean Hurtubise, for the
International Brotherhood of Electrical Workers;

Mr. Michael Church, for the International Brotherhood of
Boilermakers, Iron Ship Builders, Blacksmiths, Forgers
and Helpers, the Sheet Metal Workers' International
Association and the United Association of Journeymen and
Apprentices of the Plumbing and Pipefitting Industry of
the United States and Canada.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

In this application, the Council of Railway Unions seeks certification for a unit of shopcraft employees of the respondent railway. The bargaining unit sought is described as follows in the application:

"All employees of Canadian National Railway Company employed in the Motive Power and Car Department and in the Station and Office Building Maintenance Department, Montréal, Québec, classified as Tradesperson, Apprentice and Helper, excluding all employees of the Canadian National Railway Company employed in the Central Station in Montréal, Québec, covered by a subsisting collective agreement between the Canadian National Railway Company and the Brotherhood of Maintenance of Way Employees."

In Canadian National Railway Company (1992), as yet unreported CLRB decision n° 945, issued on July 10, 1992, the Board determined, on an application by the employer pursuant to section 18 of the Canada Labour Code, that the bargaining unit just described was the appropriate unit of shopcraft employees of the employer. The parties to that case were the employer and the six trade unions representing the six shopcraft bargaining units which had, until that time, been considered to be appropriate. In the instant case, the Council of Railway Unions has applied for certification as bargaining agent for the employees in the single unit described above.

Where a council of trade unions applies for certification as bargaining agent for a unit of employees, the usual criteria respecting applications for certification (set out in section 24 of the Code) must be met; however,

under section 32 of the Code, the Board has additional discretionary powers with respect to the certification of a council of trade unions. In the instant case, the applicant is, we find, a council of trade unions within the meaning of section 32 of the Code. The constituent trade unions are five of the six trade unions presently holding bargaining rights in respect of the employees in the employer's shops. The bargaining unit applied for is, we find (and as we found in Canadian National Railway Company, supra), a unit of employees appropriate for collective bargaining.

Two questions remain to be decided: first, the representative nature of the applicant among the employees in the bargaining unit; and second, where the applicant has established membership evidence, whether or not the Board should exercise its discretion under section 32 of the Code in favour of the applicant council.

The evidence of membership on which the applicant relies is the evidence that certain employees within the bargaining unit found to be appropriate are members of one or another of the council's constituent trade unions. In this respect the applicant relies, correctly, on the provisions of section 32(3) of the Code. Virtually all of the employees in the existing bargaining units which form the Council are members of one or another of the bargaining agents currently representing the employees in those units. These employees, then, may properly be considered members of the Council for the purposes of an application for certification.

The present application, however, is in the nature of a raid. Certainly there are existing bargaining agents,

which the applicant seeks to displace. Although those bargaining agents of course represent the employees who are now in the existing craft bargaining units, it is the right to represent the employees in the new unified unit which is at issue here. The Board has held that a raiding trade union is not entitled to be placed on a representation ballot unless it can first establish that a majority of the employees in the bargaining unit are among its members: see CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393 [1980] 1 Can LRBR 270 (CLRB no. 151). The evidence of membership on which the applicant Council relies in this case does not establish that the applicant represents a majority of the employees in the bargaining unit. Accordingly, the application is dismissed, since the applicant has not provided any evidence of membership among employees in the largest group (the carmen represented by CAW) which contains more than 50% of the employees in the overall unit sought.

In any event, had it not been for the above finding, the Board would have exercised its discretionary powers under section 32 of the Code, since we are of the view that the Council ought not be certified.

Our reasons for this are analogous to those articulated by the Board in Canadian Broadcasting Corporation (1992), as yet unreported CLRB decision no. 954, where, as is the case here, a council formed by certain incumbent trade unions sought to become bargaining agent for a unified bargaining unit which included groups of employees represented by constituent unions of the Council, as well as other unions. In that case, the Board considered the Constitution of the Council and concluded that its "fundamental rationality is geared to the current division of union jurisdiction among job classifications

and its preservation over time". The Council's constitutional arrangements were found to have been "aimed indeed at bypassing or undermining the bargaining structure determined to be appropriate". Both an application for reconsideration of that decision, and an application to the Federal Court of Appeal for judicial review were dismissed.

In the instant case as well, it is our view that a fundamental purpose of the Council's structure is the preservation of craft distinctions. This purpose is at odds with that of the bargaining unit restructuring which the Board has determined to be appropriate. The Council's structure is such as to make it responsive to the representational needs of the members, or most of the members, of its present constituent unions, and to the organizational needs of those unions themselves. But it is not organized in such a way as to maximize either effective negotiation or effective collective agreement administration for all employees coming within the industrial bargaining unit the Board has determined to be appropriate. It is significant as well that the largest of the present bargaining units, that of the railway carmen, opposes the Council. While the Council's Constitution contemplates the representation of carmen, as of course it must, it cannot be said that this group of employees - which is indeed a majority of the employees in the new unified unit - would be represented in quite the same way as those holding membership in the constituent trade unions.

In this respect, we consider it significant, at least in the circumstances of the instant case that certification of this Council, the membership of whose constituent unions amounts to less than half of the bargaining unit,

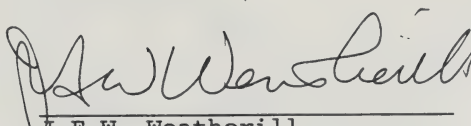
would involve the displacement of a trade union presently representing a majority of such employees. While we do not decide the point, the question arises whether or not such a result was within the contemplation of Parliament in enacting section 32 of the Code.

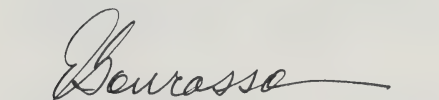
In Canadian Council of Broadcast Unions et al. v. Canada Labour Relations Board et al., judgment rendered from the bench, no. A-931-92, February 24, 1993, the Federal Court of Appeal dismissed an application for judicial review of the Board's decision in the CBC case, supra. The Court confirmed that the Board did indeed have a discretion under section 32 of the Code, and with respect to the exercise of that discretion it said:

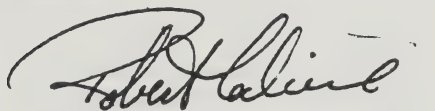
"[The Board] is entitled to look at the impact that the certification of the council of trade unions would have on the labour relations and the industrial peace in the workplace and on the well-being of the employees and their community of interest. In other words it may, as it has done in this case, assess the extent to which the certification will foster the broad industrial relations objectives underlying the rationalization and realignment of the bargaining structure. It can rely on such functional factors as the viability of the council, the ability of the council to act as a bargaining agent and the maintenance of the integrity and operation of the bargaining unit found appropriate by the Board pursuant to the realignment of the bargaining structure."

It is in light of such considerations that the Board, in the instant case, would have concluded that the certification of the Council would not be in accordance with the broad industrial relations objectives underlying the rationalization and realignment of the bargaining structure in the railway shops.

For the foregoing reasons, the application is dismissed.


J.F.W. Weatherill
Chairman


Evelyn Bourassa
Member


Robert Cadieux
Member

ISSUED at Ottawa, this 4th day of August, 1993.

CLRB/CCRT - 1021

information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Summary

Council of Railway Unions, applicant, Via Rail Canada Inc., employer, and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, intervenor.

Board file: 555-3510
Decision no. 1022

Section 32 of the Code - Application for certification filed by the Council of Railway Unions for a unified unit of shopcraft employees of the employer. The appropriate unit was established in Via Rail Canada Inc. (1992), as yet unreported CLRB decision no. 963, October 8, 1992.

The Board finds that the applicant is a council of trade unions under the provisions of section 32 of the Code. It represents three of the four unions currently holding bargaining rights for the employees concerned, the majority of whom are members of one or another of the constituent unions. The Board therefore determines that they are members of the council for the purposes of section 32(3) of the Code.

However, the Board has exercised its statutory powers and has rejected the application. The Board considers it to be significant that the union representing the carmen objects to the council and feels that the purpose of the council is to maintain distinctions between crafts. The Board is of the opinion that this violates the objectives of the reorganization of shopcraft bargaining unit structures within the railway shops. The application was rejected.

Résumé

Conseil des syndicats ferroviaires, requérant, Via Rail Canada Inc., employeur, et Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada, intervenant.

Dossier: 555-3510
Décision n° 1022

Article 32 du Code - Demande d'accréditation présentée par le Conseil des syndicats ferroviaires visant l'unité unifiée des employés d'ateliers de l'employeur jugée habile à négocier par le Conseil dans Via Rail Canada Inc. (1992), décision du CCRT n° 963, non encore rapportée, 8 octobre 1992.

Le Conseil juge que le requérant est un regroupement de syndicats au sens de l'article 32 du Code. Il représente trois des quatre syndicats actuellement détenteurs des droits de négociation des employés visés et la plupart de ces derniers sont membres de l'un ou l'autre des syndicats. Par conséquent, le Conseil considère qu'ils sont membres du regroupement au sens du paragraphe 32(3) du Code.

Toutefois, le Conseil a exercé son pouvoir discrétionnaire et rejette la requête. Le Conseil trouve significatif l'opposition de l'unité des wagonniers au regroupement et considère que l'objet du regroupement de maintenir les distinctions entre les métiers va à l'encontre de l'objectif de réorganisation de la structure de négociation au sein des ateliers de chemins de fer. Demande rejetée.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Council of Railway Unions,
applicant,

and

Via Rail Canada Inc.,
employer,

and

National Automobile, Aerospace
and Agricultural Implement
Workers Union of Canada,

intervener

Board File: 555-3510

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Mr. Jacques Alary and Ms. Mary Rozenberg, Members.

Hearing: Hearing was held in Montréal on January 20, 1993.

Appearances: Mr. Abe Rosner, for the applicant;
Ms. Anne Cartier and Mr. Ken Taylor, for the employer;
Messrs. Steve Waller and Stan Horodyski, for the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada;
Mr. John Brady, for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada;
Messrs. Michael Lanos and Valerie Bourgeois, for the International Association of Machinists and Aerospace Workers;
Mr. Jean Hurtubise, for the International Brotherhood of Electrical Workers;
Messrs. James W. Young and Attila Gyorgy, on their own behalf.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

In this application the Council of Railway Unions seeks certification for a unit of shopcraft employees of the respondent railway. The bargaining unit sought is set forth as follows in the application:

"All shopcraft employees of Via Rail. More particularly, all the employees at the employ of VIA Rail Canada Inc. assigned to the inspection, maintenance and servicing of rolling stock, excluding those already certified with the Canadian Brotherhood of Railway Transport and General Workers in a certification order issued by the Canada Labour Relations Board on Jan. 25, 1985 and covered by Wage Agreement No. 1 and excluding employees covered by certification orders issued by the Canada Labour Relations Board to other bargaining agents."

In Via Rail Canada Inc. (1992), as yet unreported CLRB decision no. 963, issued on October 8, 1992, the Board determined, on an application by the employer pursuant to section 18 of the Canada Labour Code, that the unit of employees above-described was appropriate for collective bargaining.

The parties affected by decision no. 963 were the employer and several trade unions representing the bargaining units which had, until that time, been considered to be appropriate. In the instant case the applicant council applies for certification as bargaining agent for employees coming within the scope of the new bargaining unit described above.

Where a council of trade unions applies for certification as bargaining agent for a unit of employees, the usual criteria respecting applications for certification (set out in section 24 of the Code) must be met. In addition the Board has, under section 32 of the Code, a discretion with respect to the certification of a council of trade unions. In the instant case, the applicant is, we find, a council of trade unions within the meaning of section 32 of the Code. The constituent trade unions (that is, those unions representing employees of this employer and who have conferred representational authority on the Council), are three of the four trade unions presently holding bargaining rights in respect of "craft" units of employees in the employer's shops.

Two questions remain to be decided: first, the representative nature of the applicant among the employees in the bargaining unit and second, whether or not the Board should exercise its discretion under section 32 of the Code in favour of the applicant council.

The evidence of membership on which the applicant relies is that many employees within the bargaining unit found to be appropriate are members of one or another of the Council's constituent trade unions. In this respect the applicant relies, correctly, on the provisions of section 32(3) of the Code. Virtually all of the employees in the existing bargaining units are members of the bargaining agents presently representing the employees in those units. These employees who are members of "Council" unions may, then, properly be considered members of the Council for the purposes of an application for certification.

The present application may be considered as being in the nature of a raid. Certainly there are existing bargaining agents, which the applicant seeks to displace, although those bargaining agents of course represent employees in the existing craft bargaining units, whereas it is the right to represent the employees in the new unified unit that, given our determination as to the appropriate unit in this case, is in issue here. The effect of section 29 of the Code is that a raiding trade union is not entitled to be placed on a representation ballot unless it can establish that a majority of the employees in the bargaining unit are among its members. The evidence of membership on which the applicant council relies in this case does not establish that the applicant represents a majority of the employees in the bargaining unit.

It could be argued that the present application should not be considered as a raid but that it is, in effect, simply the request of the shopcraft unions which constitute the Council and who, by virtue of their existing bargaining rights would appear to be entitled to a place on the ballot to determine who shall represent the employees in the new unified unit. While we do not consider that argument to be a valid one, it is not necessary for us to deal with that issue, since it is our view that in any event the Council ought not to be certified as bargaining agent of the new unified bargaining unit, and that our discretion under section 32 of the Code should be exercised against such certification.

Our reasons for this are analogous to those articulated by the Board in Canadian Broadcasting Corporation (1992), as yet unreported CLRB decision no. 954, where, as here,

a council formed by certain incumbent trade unions sought to become bargaining agent for a unified bargaining unit which included groups of employees represented by constituent unions of the council, as well as other unions. In that case the Board considered the constitution of the council and concluded that its "fundamental rationality is geared to the current division of union jurisdiction among job classifications and its preservation over time". The council's constitutional arrangements were found to have been "aimed indeed at bypassing or undermining the bargaining structure determined to be appropriate". Both an application for reconsideration of that decision, and an application to the Federal Court of Appeal for judicial review of that decision were dismissed.

In the instant case as well, it is our view that a fundamental purpose of the Council's structure is - quite understandably of course - the preservation of craft distinctions. This purpose is at odds with that of the bargaining unit restructuring which the Board has determined to be appropriate. The Council's structure is such as to make it responsive to the representational needs of the members, or most of the members, of its present constituent unions, and to the organizational needs of those unions themselves. But it is not organized in such a way as to maximize either effective negotiation or effective collective agreement administration for all employees coming within the industrial bargaining unit the Board has determined to be appropriate. It is significant as well that the largest of the present bargaining units, that of the railway carmen, opposes the Council. While the Council's constitution contemplates the representation of carmen, as of course it must, it cannot be said that this group

of employees - which is the largest group of employees in the new unified unit - would be represented in quite the same way as those holding membership in the constituent trade unions.

In Canadian Council of Broadcast Unions et al. v. Canada Labour Relations Board et al., judgment rendered from the bench, no. A-931-92, February 24, 1993, the Federal Court of Appeal dismissed an application for judicial review of the Board's decision in Canadian Broadcasting Corporation, supra. The Court confirmed that the Board did indeed have a discretion under section 32 of the Code, and with respect to the exercise of that discretion it said:

"[The Board] is entitled to look at the impact that the certification of the council of trade unions would have on the labour relations and the industrial peace in the workplace and on the well-being of the employees and their community of interest. In other words it may, as it has done in this case, assess the extent to which the certification will foster the broad industrial relations objectives underlying the rationalization and realignment of the bargaining structure. It can rely on such functional factors as the viability of the council, the ability of the council to act as a bargaining agent and the maintenance of the integrity and operation of the bargaining unit found appropriate by the Board pursuant to the realignment of the bargaining structure."

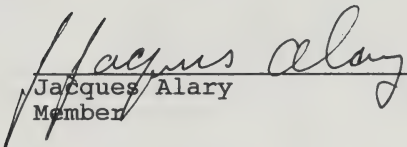
It is in the light of such considerations that the Board in the instant case has concluded that the certification of the Council would not be in accordance with the broad industrial relations objectives underlying the rationalization and realignment of the bargaining structure in the railway shops.

Accordingly, in the exercise of its discretion under section 32 of the Code, the Board dismisses this

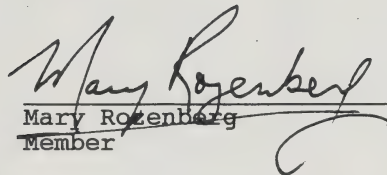
application. The vote, directed by the Board in decision no. 963, is to proceed forthwith.



J.F.W. Weatherill
Chairman



Jacques Alary
Member



Mary Rosenberg
Member

DATED at Ottawa, this 30th day of July, 1993.

CLRB/CCRT - 1022

CAI
L100
-ISS

Information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Summary

Canadian Broadcasting Corporation, applicant, Association des réalisateurs de la radio, National Association of Broadcast Employees and Technicians, Canadian Wire Service Guild (Local 213), National Radio Producers' Association, Société des auteurs, chercheurs, documentalistes et compositeurs, Canadian Union of Public Employees, Acadia and Quebec Production Employees' Union, Syndicat des journalistes de Radio-Canada, Syndicat des techniciens du réseau français de Radio-Canada, Association canadienne des réalisateurs and CBC Managers' Association, respondent unions.

Board File: 530-1828

Decision no. 1023

Global review of bargaining units. Canada Labour Code (Part I - Industrial Relations). Section 18. Motion for dismissal of the application for review filed by eight of the respondent unions. Motion dismissed.

CBC filed an application seeking to rationalize the collective bargaining structure that exists at its French network. Following the presentation of CBC's evidence, the AR, the ARR, NABET, CWSG, SARDEC, CUPE, SEPQA, the SJRC and the STRF requested that the Board

Résumé

Société Radio-Canada, requérante, et Association des réalisateurs de la radio, Syndicat national des travailleurs et travailleuses en communication, Guilde des services de presse du Canada (section locale 213), Association nationale des réalisateurs de la radio, Société des auteurs, chercheurs, documentalistes et compositeurs, Syndicat canadien de la Fonction publique, Syndicat des employés de production du Québec et de l'Acadie, Syndicat des journalistes de Radio-Canada, Syndicat des techniciens du réseau français de Radio-Canada, Association canadienne des réalisateurs et Association des cadres de Radio-Canada, syndicats intimés.

Dossier du Conseil: 530-1828

Décision n° 1023

Révision globale des unités de négociation. Code canadien du travail (Partie I - Relations du travail). Article 18. Requête pour rejet de la demande de révision présentée par huit des syndicats intimés. Requête rejetée.

Radio-Canada a présenté une demande en vue de rationaliser la structure de négociation collective existant dans ses services français. À la suite de la présentation de la preuve de Radio-Canada, l'AR, l'ARR, NABET, la Guilde, SARDEC, le SCFP, SEPQA, le SJRC et le STRF

dismiss the application for global review. In their opinion, CBC has not shown that the current units were no longer appropriate for collective bargaining and, therefore, there was no need to review them.

The Board, after having considered the evidence and reviewed the jurisprudence, reaffirms the progressive character of bargaining certificates as outlined in a previous Board decision and determines that the bargaining units are no longer appropriate.

However, the Board does not determine which bargaining units will henceforth be appropriate. It will first proceed to hear the unions' point of view on this question.

ont demandé au Conseil de rejeter cette demande de révision globale. Selon eux, Radio-Canada n'a pas démontré que les unités actuelles ne sont plus habiles à négocier et qu'en conséquence il n'y a pas lieu de les réviser.

Le Conseil, après analyse de la preuve et une revue de la jurisprudence, réaffirme le caractère évolutif des certificats d'accréditation tel qu'il est énoncé dans une décision antérieure du Conseil et décide que les unités de négociation ne sont plus habiles à négocier.

Le Conseil ne décide toutefois pas quelles unités seront désormais habiles à négocier. Il entendra en premier lieu le point de vue des syndicats sur cette question.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Broadcasting Corporation,

applicant,

and

Association des réalisateurs de la radio, National Association of Broadcast Employees and Technicians, Canadian Wire Service Guild (Local 213), National Radio Producers' Association, Société des auteurs, recherchistes, documentalistes et compositeurs, Canadian Union of Public Employees, Acadia and Quebec Production Employees' Union, Syndicat des journalistes de Radio-Canada, Syndicat des techniciens du réseau français de Radio-Canada, Association canadienne des réalisateurs and CBC Managers' Association,

respondent unions.

Board File: 530-1828

The Board was composed of Mr. Serge Brault, Vice-Chair, and Mr. J. Jacques Alary and Ms. Ginette Gosselin, Members.

Appearances

Ms. Suzanne Thibaudeau, Q.C., and Mr. Guy Dufort, for the Canadian Broadcasting Corporation;

Mr. Gaston Nadeau, for the Canadian Union of Public Employees;

Mr. Robert Côté, for the National Association of Broadcast Employees and Technicians;

Mr. Bruno Guglielminetti, for the National Radio Producers' Association;

Mr. Guy Martin, for the Syndicat des journalistes de Radio-Canada;

Mr. Daniel Carrier, for the Société des auteurs, recherchistes, documentalistes et compositeurs;

Mr. Allen Gottheil, for the Association des réalisateurs de la radio;

Mr. Jean-Pierre Belhumeur, for the Association canadienne

des réalisateurs;

Mr. Gino Castiglio, for the Syndicat des techniciens du réseau français de Radio-Canada;

Mr. Pierre Grenier, for the Acadia and Quebec Production Employees' Union;

Mr. Jean-Jacques Bérard, for the CBC Managers' Association.

These reasons for decision were written by Ms. Ginette Gosselin, Member.

I

This case deals with a motion for dismissal filed by eight of the respondents while the Board was considering an application for review of its bargaining structure filed by the Canadian Broadcasting Corporation (CBC) pursuant to section 18 of the Code.

In two separate applications, one concerning the English network (530-1827) and the other the French network, CBC asked the Board to rationalize the bargaining structure in which its unionized employees are found. The Board initially heard and determined the application concerning the English network, and it now turns to the present application.

For the application concerning the English network (Canadian Broadcasting Corporation, June 7, 1990 (LD 849), and Canadian Broadcasting Corporation (1991), 84 di 2 (CLRb no. 846)), the Board had to consider the geographical delimitation of what are known as the French and English networks for labour relations purposes. It found that what is referred to as the French network would include all CBC employees working in the province of Quebec and in Moncton, N.B., regardless of the language of broadcast of the programs on which they work. The English network would, on

the other hand, include employees working elsewhere in Canada.

II

As is evident from the style of cause, there are numerous bargaining agents in the French network. CBC is asking the Board to declare that the following five units are appropriate for collective bargaining:

1. a program presentation unit,
2. a program production unit,
3. an administrative, clerical, secretarial and support unit,
4. a radio producers' unit, and
5. a television producers' unit.

CBC claimed that the review of the bargaining units is necessary for the following reasons:

"5. In the present context, where boundaries exist between bargaining units of similar communities of interests and activities, who are represented by bargaining agents who constantly seek to protect or enlarge the scope of their bargaining units, the introduction of new work and new technology has been and will continue to be a source of conflict;

6. These conflicts are resulting in continuing and increasing challenges and requests to the CLRB for revision to current certifications which result in creating 'patchwork' bargaining units;

7. Given the above it has become more and more evident that the bargaining unit structure, inherited from a past with different technologies and organizational structure, is now inappropriate to ensure and promote industrial peace and rational and efficient operation of the CBC;

8. The present structure and union insistence on maintaining old jurisdictional lines act as a bar to proper management of human resources and are also a major cause of operational inefficiencies;

9. Furthermore, the fragmentation of the bargaining units creates unnecessary hurdles to administrative efficiency in bargaining, seriously restricts lateral mobility for

employees performing similar work, and unduly complicates standardization of the terms of employment; ..."

The Canadian Union of Public Employees (CUPE), the Société des auteurs, recherchistes, documentalistes et compositeurs (SARDEC), the National Association of Broadcast Employees and Technicians (NABET) - GCMI, the Association des réalisateurs de radio (ARR), the Syndicat des journalistes de Radio-Canada (SJRC), the Acadia and Quebec Production Employees' Union (SEPQA), the Syndicat des techniciens du réseau français de Radio-Canada (STRF) and the Association canadienne des réalisateurs (AR) have joined forces to challenge the merits of this application and move for its dismissal. However, all reserved their right to submit to the Board rationalization hypotheses different from those proposed by CBC, should the Board consider there to be matter for review. The ARR clearly indicated its preference for a unit comprised of all radio and television producers. Those eight bargaining agents filed a joint motion for dismissal after CBC had completed the presentation of evidence in support of its arguments.

The Canadian Wire Service Guild, Local 213 (the Guild), the National Radio Producers' Association (NRPA), and NABET did not submit arguments in this case. One effect of the Board's decision to delimit the two networks in the above-mentioned manner is to deprive these three unions of their rights to represent employees in Quebec and Moncton, once those employees have joined one of the bargaining units in the French network. This no doubt explains their silence in the present case.

Hearings were held in Montréal on December 1, 2 and 3, 1992, January 26, 27 and 28, 1993, February 17, 18 and 19, March 30 and 31, and April 19 and 20, 1993. The Board also viewed and listened to recordings of television and radio programs

filed in the course of its hearings.

III

The Evidence

The Crown corporation CBC has received the following mandate from Parliament under the Broadcasting Act, R.S.C. 1970, c. B-11:

- "(g) the national broadcasting service should
 - (i) be a balanced service of information, enlightenment and entertainment for people of different ages, interests and tastes covering the whole range of programming in fair proportion,
 - (ii) be extended to all parts of Canada, as public funds become available,
 - (iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and
 - (iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity; ..."

Accordingly, it produces radio and television programs in English, French and some aboriginal languages using national, regional and local production crews. The programs produced are described as information programs (news, public affairs and current events) and general programming. This diversity in language of production, broadcast medium and type of production, when combined with the administrative and support services required by an undertaking of this magnitude, results in a very complex organizational structure. But such complexity is not found in the labour relations department. Labour relations are managed from the head office in Ottawa; labour relations officers also work in Montréal and Toronto.

A large portion of CBC's revenues comes from the federal government. The remainder derives from its commercial

activities.

The unions began to establish themselves at CBC in the 1950s, along the lines of the structure and the production means existing at the time. Some of the original bargaining units were amended following decisions of the Board or its predecessor, and in many cases the bargaining agents have changed. We will give a concise description of the bargaining units covered by this application, indicating the approximate membership of each.

CUPE (1273 employees) consists of professional and office employees. For the purposes of these proceedings, it is worth noting that this unit includes the hosts, commentators-interviewers and announcers who work on all programs other than those produced by the news service. This group was originally (1953) included in a national unit which was split between the two networks in 1980.

The SJRC (364 employees) was certified in 1968 under the name of Syndicat général de cinéma et la télévision. In addition to journalists, it also represents hosts, interviewers, commentators and researchers assigned to programs produced by the news service. This group too was originally (1952-1953) included in a national unit represented by the Canadian Wire Service Guild, Local 213 of the American Newspaper Guild.

SARDEC (51 employees) represents the researchers and documentalists hired by CBC for programs other than those of the Montréal news service. This unit results from a voluntary recognition by CBC. Its last collective agreement was in 1991.

SEPQA (672 employees) was certified in 1977 and 1978 to represent some of the French network production employees.

This group includes machinists, painters, projectionists, editors, make-up artists, tailors/dressmakers and special-effects people. It also represented cameramen until the mid-1980s. This group was originally (1953) included in a national unit represented by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, which was replaced in 1968 by CUPE.

The STRF (696 employees) was certified in 1979 to represent employees in the French network technical group. This group includes technicians (maintenance, radio, television, control room, etc), editors, cameramen, lighting specialists and sound-effects people. For the purposes of these reasons, it is important to note that the union also has jurisdiction over equipment belonging to CBC which the latter uses to produce its programs. From 1953 to 1979, this group was included in a national unit represented by NABET.

NABET-GCMI (57 employees) was certified in 1982. It represents employees in the building maintenance group in the province of Quebec and in Moncton. This group includes mechanics, carpenters, electricians and painters. It was originally (1963) included in the national unit also represented by NABET.

The AR (214 employees) was certified in 1981 to represent all categories of television producers in Montréal, Québec, Matane, Rimouski, Sept-Iles and Moncton. The only effect of subsequent amendments to its certification has been to add some localities to the original list.

The ARR (109 persons) represents all categories of radio producers in the Quebec production centres of Montréal, Québec, Chicoutimi, Matane, Rimouski and Sept-Iles. This

unit results from a voluntary recognition. Its last collective agreement was signed February 19, 1992.

Over the years, the Board has on numerous occasions amended these units. Apart from the above-mentioned changes, it has usually added classifications to or removed them from some bargaining certificate. However, one Board decision has been of greater importance: Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRB no. 383), where the Board found that free-lance hosts, commentators and interviewers were employees within the meaning of the Code, and directed that they join the existing certified groups, namely the SJRC or CUPE. Until then, these employees had been represented by the Union des Artistes (UDA). We will return to this later.

CBC's evidence also established the periodic occurrence of union jurisdictional disputes. While certain grievances remain pending, most have been settled, either by agreement between the parties or by the intervention of arbitration boards, and occasionally this Board. The evidence also demonstrated to us the intricacies of staffing involving various units of persons employed in the presentation of programs (journalists, hosts, interviewers, etc). In these groups, union membership varies as much according to the place and origin of the programs as it does according to the actual job functions. To cite one example, a television weatherman on an early evening news program could be a member of the SJRC unit in Montréal and of the CUPE group in Québec.

CBC's evidence also demonstrated an evolution that has been both constant and radical in production means and processes. One of the major changes in the 1980s was the replacement of film by videotape. This led to the disappearance of cameramen from the SEPQA group and their transfer, not an

entirely smooth one, to the STRF. Computerization has also had a significant impact on the technical content of certain jobs.

The evolution of radio and telecommunications media resulted, especially in the 1980s, in a proliferation of broadcasters. We are thinking of the arrival of TQS, RDS, cable television with all of its channels, and so forth. These newcomers have directly affected CBC's capacity to market its programs. And when that revenue source dried up, CBC also had to reorganize certain services because of the budget restraints imposed by the federal government.

IV

Arguments of the Parties

The unions want the Board to dismiss CBC's application because it would not meet the criteria established by the case law in this type of case.

First, they claim that past Board decisions involving them are decisive in the case at bar. They cite the 1978 decision which certified SEPQA with regard to a group of production employees, that of 1979 which certified the STRF with regard to another group of production employees, and finally that of 1982 which brought the free lancers into the SJRC and CUPE. In their view, these decisions confirm the appropriateness of these units. According to them, the evidence of CBC's difficulties ascribed to the bargaining structure cannot extend back any further than the time of these decisions. They argue that the Board, in rendering these decisions, approved a structure that cannot be questioned today.

The unions allege that it has not been established that the

current bargaining units are no longer appropriate for collective bargaining. CBC is still the same corporation, and no major change has occurred there since these decisions. Furthermore, union jurisdictional disputes are supposedly rare and exaggerated, while the unions are always prepared to settle with the employer. And negotiations for the renewal of collective agreements have generally been harmonious for many years.

They further add that the current units are harmonious, based on community-of-interest criteria, and that they correspond to the corporate structure. They claim that the apparent irrationalities in the SJRC and CUPE units derive first and foremost from CBC's own distinction between information programs and general programming. In this regard, the SJRC in particular notes that only its members are subject to rigorous application of CBC's Journalistic Policy. Counsel for the union even asked that the Board grant its members the protection of section 27(3) of the Code, which is applicable only to professional employees.

By way of reply, CBC claims that the current structure is obsolete, and that the evidence clearly demonstrates that the bargaining units are no longer appropriate for collective bargaining.

It further claims that the changes made by the Board to the bargaining units, including those mentioned by the unions, constitute ad hoc interventions which cannot defeat the present application for a global review.

CBC also argues that the evidence demonstrates that union jurisdictional disputes do occur and that the jurisdictional overlaps between several bargaining units affected by its application are an ongoing source of disputes. It recognizes that there could have been more disputes, but it

takes the credit for this: it has been a good employer which, anxious to avoid disputes, has rigorously respected, at the cost of irrationality, the limits imposed by the current bargaining certificates and collective agreements.

Finally, CBC maintains that the evolution and changes that have occurred in production methods warrant a major reorganization and rationalization of the bargaining units. These changes demand a flexibility and capacity to adapt that are thwarted by the artificial divisions between an excessive number of unions. It concludes that 40 years of tradition in labour relations, technological evolution and administrative change, combined with severe budget restrictions and completely new sources of competition, warrant a thorough review of the bargaining structure.

V

Decision

The Board's power to review its decisions is set forth in section 18:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

In this case, it is a matter of reviewing decisions issued by the Board under section 24 of the Code:

"24.(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit."

With regard to applications filed pursuant to section 24,

the Board has powers which include the following:

"27.(1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.

(2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union."

The Board has long recognized the progressive character of bargaining units. This is shown in the analysis it made of section 119 (now section 18) in Teleglobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198).

"Bargaining Certificates: Static or Evolving
For some time now, specialists in labour relations have put into question the static character of collective agreements.

The theory of the inviolability of contracts, close to the heart of civil law, has no doubt, probably by osmosis, considerably influenced for some time the immutable character of collective agreements for periods of one or two years or longer. The maintenance intact of certain clauses up to the expiry of the term of a collective agreement has caused major conflicts, some unresolvable with the passage of time. A collective agreement is a living thing.

The same is true in the case of bargaining units determined appropriate by the Board. This is why we saw earlier that the Woods Task Force swiftly arrived in its recommendations on the subject of the determination of bargaining units, in speaking in the same breath of their redetermination. Everything said in the one case applied almost integrally in the other.

...

We are also of the opinion that a certification order has a continuing effect and that in the sense we have just indicated. It thus appears to us that it is important that a Board like this be readily available to modify an order when its effect on collective bargaining, or on the rights of parties or employees, or on certain among them, no longer corresponds to reality.

...

The Woods Report hoped that the Board would play

a leading role, as a result of its powers of revision, even 'proprio motu', in facilitating the composition of bargaining units so that they find their own equilibrium. Flowing from this hope is the suggestion that during the re-examination of the composition of an existing unit the Board study the problems of the industry and carry on whatever research is necessary, either itself or with the help of specialists, and hold public hearings.

The methods of operation of this Board since 1973 are now well known. It has endowed itself with a support and research staff capable of supplying it with all necessary information as alluded to by the Woods Task Force. The investigatory format established by the Board keeps it informed on industry problems. When such information is lacking, the Board holds public hearings.

The Board is therefore well organized to redetermine the composition of existing bargaining units and to review and modify them so that they respond to the realities of the moment and of the milieu. Indeed, those specialists whom we have referred to are located in each region of the country and have integrated themselves into the labour relations world of their area."

(pages 302-306; and 113-116)

In this connection, in Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661), the Board reiterated that certification does not confer some sort of proprietary right:

"Furthermore, it has been clearly established by this Board that trade unions which hold bargaining rights for any particular group of employees are not vested with proprietary rights in the continued existence of their bargaining rights. ..."

(pages 96; 235; and 14,032)

However, anxious to protect the definitive character of its decisions and the stability of labour relations, the Board set out certain guidelines for the exercise of its review power. In cases involving the amendment of one or more certification orders, these guidelines pertain mainly to review applications filed by unions. These applications often raise the issue of the employees' wish to become unionized, and sometimes the issue of their choice of

bargaining agent. Until recently, applications from employers only dealt with minor changes to be made to a certification order. This was pointed out by the Board in Marine Atlantic Inc. (1990), 82 di 91; and 91 CLLC 16,001 (CLRB no. 822), where it added:

"The review application by Marine Atlantic (530-1626) forms part of a new breed of review applications. It is review applications by employers to realign their bargaining structures. Nowhere had the Board in its jurisprudence since 1973 ever restricted the right of employers to use section 18 (former section 119) of the Code to achieve this goal.

Employers have been slow to realize the potential benefits which they could obtain through that avenue.

Besides Marine Atlantic, the most outstanding review applications of that new type would be Cape Breton Development Corporation and Canada Post Corporation. Both produced extensive reasons for decision by the Board: Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661); Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675). There is another one pending before the Board involving VIA Rail. It is however of a smaller nature. But there is also large ones involving CBC, the Canadian National Railway Company and the Canadian Pacific Railway Company."

(pages 125; and 14,018)

Before Marine Atlantic Inc., *supra*, there was also Canada Transport Group Ltd. (1989), 78 di 174; 5 CLRBR (2d) 119; and 89 CLLC 16,044 (CLRB no. 759), and others have since been added: Canadian National Railway Company (1992), 88 di 139 (CLRB no. 945); Canadian Pacific Limited (1992), 88 di 126 (CLRB no. 944); Canadian Broadcasting Corporation (846), *supra*; VIA Rail Canada Inc. (1992), as yet unreported CLRB decision no. 963; Quebec North Shore & Labrador Railway Co. (1992), 93 CLLC 16,020 (CLRB no. 978); and Purolator Courier Ltd. (1993), as yet unreported CLRB decision no. 1003.

What is clear from these decisions, apart from the fact recognized by all that each is an individual case, is that it must be established that the units are not or are no

longer appropriate, that they are complex or obsolete, depending on the vocabulary used in the particular decision. In other words, the applications have to be based on reasons associated with the organization of sound labour relations.

Therefore, the Board will not welcome from an employer, any more than it would from a union, applications based on short-term opportunism that is designed, for example, to short-circuit the bargaining process. On each occasion, the Board must carefully weigh the reasons supporting the application in terms of the principles cited earlier, i.e. the definitive character of its decisions and the stability of labour relations. As the Board pointed out in Teleglobe Canada, supra:

"This Board is therefore of the view that the reconciling of the wishes of Parliament towards the rights of the employees to freedom of association, their rights to fair representation, the rights and obligations of certified unions, the rights of the public to orderly labour relations through the determination of viable and realistic bargaining units, and the rights of employers to operate their enterprises in an efficient manner, constitute an exercise in balancing where it may happen that some rights, which were believed before to be carved in marble, may sometimes have to be balanced against others which the general public good makes it imperative to favour."

(pages 316-317; and 125)

Should it decide that certain bargaining units are no longer appropriate, the Board will establish new ones, on the basis of the rules and criteria generally applicable to certification. It will then determine the bargaining agent for each, according to the rule of the majority.

These two aspects need not be dealt with here, however, since this decision is restricted to the unions' motion to dismiss the review application filed by the employer.

VI

Disposition

Our analysis of the evidence convinces us that the units at CBC are no longer appropriate for collective bargaining.

Examination of the bargaining certificates and union recognition clauses everywhere reveals, their dates notwithstanding, an organizational model that dates back to the 1950s or 1960s. The reviews to which the original units have been subjected have not altered the basic model.

For the STRF, SEPQA and NABET-GCMI units, it has simply been a matter of dividing into two networks the national units that formerly covered these employee categories. The intended scope of these certificates was not otherwise amended. The same applies to the bargaining certificates held by the SJRC and CUPE. The review that was carried out at the same time as the certification application filed by the UDA in 1982 resulted in the inclusion of free-lance hosts, interviewers and commentators in one of the already certified bargaining units. This involved reviewing exclusions from existing units, rather than reviewing the units themselves. It was then decided to include in existing units persons whose main characteristic was that they worked on contract, rather than on a permanent basis. The two host units remained basically the same: on the one hand, a unit consisting of journalists working in information, and on the other, employees, including support, hosts, interviewers and commentators, working elsewhere than in news. All the rest remained unchanged.

Union representation at CBC thus continued to be based on the 1950s model. It is trite to say that operating methods and techniques have changed considerably, and that they

continue to change. CBC too has changed: it is making more use of regional stations in its national programming, even though entire production centres have been closed because of budget cuts. In this context, methods of work organization and employees' careers also have to change. With deference to the opposing view, the rigidity of the present bargaining structure does not make this possible.

The overlapping of labour jurisdictions between units generates conflicts or absurdities which are amply demonstrated by the evidence. The parties, employer and unions alike, say they have shown flexibility and understanding, to the point of minimizing problems. Be that as it may, both sides are skating on thin ice. CBC maintained that it had respected the bargaining certificates and voluntary recognitions, despite its desire and its need to sometimes act otherwise for the smooth operation of its affairs. The unions stated that they have shown themselves to be tolerant and flexible with the employer. What these attitudes, which are certainly positive, have in common is that they establish the need to make some permanent changes. However, the Board will not make bring about changes one by one, as it has done in the past.

The Board is satisfied that the current structure must be the subject of a global review. However, CBC has not yet convinced the Board of the merits of the solutions it advocates. After all, all of the unions, except for the ARR, have reserved the right to commit themselves on this matter only after this decision has been issued.

Hence, the Board will proceed with the global review of the bargaining structure of CBC's French network.

Before determining which bargaining units will henceforth be appropriate for collective bargaining, the Board will allow

all unions involved to express their point of view and, if necessary, to submit evidence. The registrar of the Board will contact the parties on this matter in the coming days.

Serge Brault

Serge Brault
Vice-Chair

G. Gosselin

Ginette Gosselin
Member

J. Jacques Alary

J. Jacques Alary
Member

ISSUED at Ottawa, this 4th day of August 1993.

CCRT/CLRB - 1023

information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Summary

Canadian Council of Railway Operating Unions, applicant, and Canadian National Railway Company, employer.

Board file: 555-3493
Decision no. 1024

Section 32 of the Code - Certification application filed by the Canadian Council of Railway Operating Unions, composed of two member trade unions being the International Brotherhood of Locomotive Engineers and the United Transportation Union. The Board found that the applicant is a council of trade unions within the meaning of section 32 of the Code.

The Board found that a unit of all running trades employees, (including, to put the matter broadly, "engineers" and "trainmen") was appropriate for collective bargaining. The applicant represents a majority of employees in the appropriate bargaining unit.

From the standpoint of collective bargaining power and from that of collective agreement administration, the Board considered that it should exercise its discretion in favour of the certification of the Council. Application granted.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Conseil canadien des syndicats opérationnels de chemins de fer, requérant, et Compagnie des chemins de fer nationaux du Canada, employeur.

Dossier: 555-3493
Décision n° 1024

Article 32 du Code - Demande d'accréditation présentée par le Conseil canadien des syndicats opérationnels de chemins de fer, composé de deux syndicats membres: la Fraternité des ingénieurs de locomotives et le syndicat des Travailleurs unis des transports. Le Conseil a jugé que le requérant était un regroupement de syndicats au sens de l'article 32 du Code.

Le Conseil a jugé qu'une unité comprenant tous les employés itinérants (notamment, dans un sens général, les «ingénieurs» et les «waggonniers») était habile à négocier collectivement. Le requérant représente la majorité des employés compris dans l'unité de négociation jugée habile à négocier.

Du point de vue du pouvoir de négocier collectivement et d'appliquer une convention collective, le Conseil estime qu'il devrait exercer son pouvoir discrétionnaire en faveur de l'accréditation du regroupement. Demande agréée.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Canadian Council of Railway Operating
Unions,

applicant,

and

Canadian National Railway Company,
respondent employer.

Board file: 555-3493

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
and Ms. Evelyn Bourassa and Mr. Robert Cadieux, Members.

Hearing: A hearing was held in Montréal on January 22,
1993.

Appearances: Mr. Harold F. Caley, and Mr. B. Marcolini for
the applicant and for the United Transportation Union;
Mr. Philip Hunt and Mr. G. Hainsworth, for the applicant
and for the International Brotherhood of Locomotive
Engineers;

Mr. John Coleman and Mr. W.T. Lineker, for the respondent.

These reasons for decision were written by Mr. J.F.W.
Weatherill, Chairman.

I

This is an application for certification pursuant to
section 32 of the Canada Labour Code.

The applicant, the Canadian Council of Railway Operating
Unions, is constituted as a council of trade unions, its
constituent member trade unions being the International
Brotherhood of Locomotive Engineers and the United
Transportation Union, each of which has been found by this
Board to be a trade union within the meaning of the Canada

Labour Code. Having considered the material filed with the Board in support of the application, the Board finds that the applicant is a council of trade unions within the meaning of section 32 of the Code.

The bargaining unit suggested by the applicant as appropriate for collective bargaining is the following:

"All running trades employees of the employer designated as locomotive engineer, conductor, baggageman, brakeman, car retarder operator, yardman, switchtender, yardmaster, assistant yardmaster and locomotive fireman (helper)".

In a separate application, 530-1851, the employer, the respondent in the instant case, has applied for a restructuring of its running trades bargaining units, and suggested the following as a unit appropriate for collective bargaining:

"All running trade employees designated as locomotive engineer, conductor, baggageperson, brakeperson, car retarder operator, yardperson, yard operations employee, switchtender, yardmaster, assistant yardmaster, locomotive fireman/helper working for Canadian National Railway Company lines in Canada."

The employer opposes the instant application, and has argued that the applicant would not be a viable bargaining agent. With respect to the matter of the definition of the bargaining unit, the employer's position would appear to be inconsistent; in fact it is clear that the employer considers, as does the applicant, that a single bargaining unit is appropriate for the running trades employees of the employer. The Board agrees with what it considers to be the true views of the parties in this respect. The present bargaining agents, representing two bargaining units composed, to put the matter broadly, of "engineers" and of "trainmen" are the present successors of trade unions which have represented various groups of employees involved in

the operations of trains over almost a century. Within each of the present bargaining units, related and, to varying degrees, interchangeable work is performed, although there is no significant interchangeability as between members of the two bargaining units as such. It is nevertheless the case that many persons having seniority in one bargaining unit have seniority in the other, and the running trades are identifiable collectively as distinct from other groups of railway employees. It is well known that the two groups have often engaged jointly in bargaining with the employer. In our view there is a substantial community of interest, both from the point of view of negotiations and from that of collective agreement administration between the two groups, and we consider it appropriate that they come together in one bargaining unit.

The Board finds the following unit of employees appropriate for collective bargaining:

"All running trades employees designated as locomotive engineer, conductor, baggage person, brake person, car retarder operator, yard person, yard operations employee, switchtender, yardmaster, assistant yardmaster, locomotive fireman/helper working for Canadian National Railway Company lines in Canada."

In an application by a council of trade unions made pursuant to section 32 of the Code, the Board has a discretion with respect to the certification of the council, which it would not have in the case of an application by a single trade union under section 28 of the Code. In Canadian Council of Broadcast Unions et al. v. Canada Labour Relations Board et al., judgment rendered from the bench, no. A-931-92, February 24, 1993, the Federal Court of Appeal, dismissing an application for judicial review of the Board's decision in Canadian Broadcasting Corporation (1992), 87 di 163; and 92 CLLC 16,036 (CLRB no. 926), said the following:

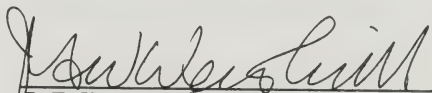
"[The Board] is entitled to look at the impact that the certification of the council of trade unions would have on the labour relations and the industrial peace in the workplace and on the well-being of the employees and their community of interest. In other words it may, as it has done in this case, assess the extent to which the certification will foster the broad industrial relations objectives underlying the rationalization and realignment of the bargaining structure. It can rely on such functional factors as the viability of the council, the ability of the council to act as a bargaining agent and the maintenance of the integrity and operation of the bargaining unit found appropriate by the Board pursuant to the realignment of the bargaining structure."

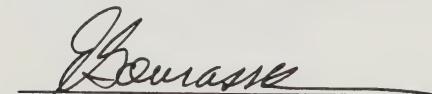
In a case involving the present employer and the Council of Railway Unions, relating to the employer's shopcraft employees (CLRB no. 1021), the application was dismissed for lack of support. The Board made it clear, however, that it would have exercised its discretion against the council of trade unions which had applied for certification in that case. There, the Board had determined that a single unit of shopcraft employees was appropriate for collective bargaining. Previously, the employees in question had come within one or another of six bargaining units. The Board noted that a fundamental purpose of the Council's structure was the preservation of craft distinctions. While something similar might perhaps be said in the instant case, the effect of such an observation would be different, since the question of increased flexibility of work assignment is not in issue in this case to the extent it was in that case. Another, perhaps more significant, distinction between the two cases is that in the shopcraft case the applicant Council represented (through its constituent trade unions), slightly less than a majority of the employees in the new unified bargaining unit, whereas in the instant case the applicant Council (through its constituent trade unions), represents virtually all of the employees in the unit. Both from the standpoint of bargaining power as well as from that of collective agreement administration, it is our view that

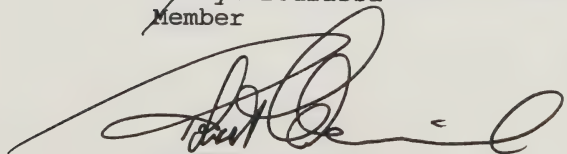
sufficient grounds do not exist in this case to justify the refusal of bargaining agent status to the applicant Council. There is no labour relations consideration that would bring the Board to dismiss the application.

The Board has found that the applicant is a council of trade unions within the meaning of the Code. Upon consideration of the evidence of membership (membership in a constituent trade union is, by section 32 of the Code, membership in the council for the purpose of an application for certification), we find that the applicant represents a majority of the employees in the bargaining unit which we have found to be appropriate. As we have noted above, we consider that in the present case our discretion should be exercised in favour of the certification of the Council.

Accordingly, the application is granted. A certificate will be issued to the applicant in respect of the bargaining unit described above.


J.F.W. Weatherill
Chairman


Evelyn Bourassa
Member


Robert Cadieux
Member

ISSUED at Ottawa, this 6th day of August, 1993.

information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Summary

Canadian Council of Railway Operating Unions, applicant, and Canadian Pacific Limited, employer.

Board file: 555-3494
Decision no. 1025

Section 32 of the Code - Certification application filed by the Canadian Council of Railway Operating Unions, composed of two member trade unions being the International Brotherhood of Locomotive Engineers and the United Transportation Union. The Board found that the applicant is a council of trade unions within the meaning of section 32 of the Code.

The Board found that a unit of all running trades employees (including, to put the matter broadly, "engineers" and "trainmen") was appropriate for collective bargaining. The applicant represents a majority of employees in the appropriate bargaining unit.

From the standpoint of collective bargaining power and from that of collective agreement administration, the Board considered that it should exercise its discretion in favour of the certification of the Council. Application granted.

Résumé

Conseil canadien des syndicats opérationnels de chemins de fer, requérant, et Canadien Pacifique Limitée, employeur.

Dossier: 555-3494
Décision n° 1025

Article 32 du Code - Demande d'accréditation présentée par le Conseil canadien des syndicats opérationnels de chemins de fer, composé de deux syndicats membres: la Fraternité des ingénieurs de locomotives et le syndicat des Travailleurs unis des transports. Le Conseil a jugé que le requérant était un regroupement de syndicats au sens de l'article 32 du Code.

Le Conseil a jugé qu'une unité comprenant tous les employés itinérants (notamment, dans un sens général, les «ingénieurs» et les «wagonniers») était habile à négocier collectivement. Le requérant représente la majorité des employés compris dans l'unité de négociation jugée habile à négocier.

Du point de vue du pouvoir de négocier collectivement et d'appliquer une convention collective, le Conseil estime qu'il devrait exercer son pouvoir discrétionnaire en faveur de l'accréditation du regroupement. Demande agréée.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Council of Railway
Operating Unions,

applicant,

and

Canadian Pacific Limited,

respondent employer.

Board file: 555-3494

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
and Ms. Evelyn Bourassa and Mr. Robert Cadieux, Members.

Hearing: A hearing in this matter was held in Montréal, on
January 21, 1993.

Appearances: Messrs. Harold F. Caley and B. Marcolini for
the applicant and for the United Transportation Union;
Messrs. Philip Hunt and G. Hainsworth, for the applicant
and for the International Brotherhood of Locomotive
Engineers; and
Messrs. Denis Courcy and Marc Shannon, for the respondent.

These reasons for decision were written by Mr. J.F.W.
Weatherill, Chairman.

I

This is an application for certification pursuant to
section 32 of the Canada Labour Code.

The applicant, the Canadian Council of Railway Operating
Unions, is constituted as a council of trade unions, its
constituent member trade unions being the International
Brotherhood of Locomotive Engineers and the United
Transportation Union, each of which has been found by this
Board to be a trade union within the meaning of the Canada

Labour Code. Having considered the material filed with the Board in support of the application, the Board finds that the applicant is a council of trade unions within the meaning of section 32 of the Code.

The bargaining unit suggested by the applicant as appropriate for collective bargaining is the following:

"All running trades employees of the employer designated as locomotive engineer, conductor, baggageman, brakeman, car retarder operator, yardman, switchtender, yardmaster, assistant yardmaster and locomotive fireman (helper)".

In a separate application, 530-1849, the employer, the respondent in the instant case, has applied for a restructuring of its running trades bargaining units, and suggested the following as a unit appropriate for collective bargaining:

"All running trades employees designated as locomotive engineer, conductor, baggageman, brakeman, car retarder operator, yardman, switchtender, yardmaster, assistant yardmaster, locomotive fireman (helper) working on the Canadian Lines of Canadian Pacific Limited and its subsidiaries and leased lines".

With respect to the instant application the employer, consistently, takes the position that one bargaining unit with one bargaining agent would best serve industrial relations. The Board agrees with the parties in this respect. The present bargaining agents, representing two bargaining units composed, to put the matter broadly, of "engineers" and of "trainmen" are the present successors of trade unions which have represented various groups of employees involved in the operations of trains over almost a century. Within each of the present bargaining units, related and, to varying degrees, interchangeable work is performed, although there is no significant interchangeability between members of the two bargaining units as such. It is nevertheless the case that many

persons having seniority in one bargaining unit, have seniority in the other, and the running trades are identifiable collectively as distinct from other groups of railway employees. It is well known that the two groups have often engaged jointly in bargaining with the employer. In our view there is a substantial community of interest, both from the point of view of negotiations and from that of collective agreement administration between the two groups, and we consider it appropriate that they come together in one bargaining unit.

The Board finds the following unit of employees appropriate for collective bargaining:

"All running trades employees designated as locomotive engineer, conductor, baggageman, brakeman, car retarder operator, yardman, switchtender, yardmaster, assistant yardmaster, locomotive fireman (helper) working on the Canadian Lines of Canadian Pacific Limited and its subsidiaries and leased lines".

In an application by a council of trade unions made pursuant to section 32 of the Code, the Board has a discretion with respect to the certification of the council, which it would not have in the case of an application by a single trade union under section 28 of the Code. In Canadian Council of Broadcast Unions et al. v. Canada Labour Relations Board et al., judgment rendered from the bench, no. A-931-92, February 24, 1993, the Federal Court of Appeal, dismissing an application for judicial review of the Board's decision in Canadian Broadcasting Corporation (1992), 87 di 163; and 92 CLLC 16,036 (CLRB no. 926), said the following:

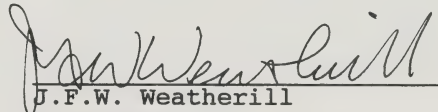
"[The Board] is entitled to look at the impact that the certification of the council of trade unions would have on the labour relations and the industrial peace in the workplace and on the well-being of the employees and their community of interest. In other words it may, as it has

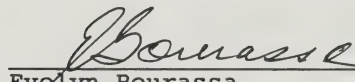
done in this case, assess the extent to which the certification will foster the broad industrial relations objectives underlying the rationalization and realignment of the bargaining structure. It can rely on such functional factors as the viability of the council, the ability of the council to act as a bargaining agent and the maintenance of the integrity and operation of the bargaining unit found appropriate by the Board pursuant to the realignment of the bargaining structure."

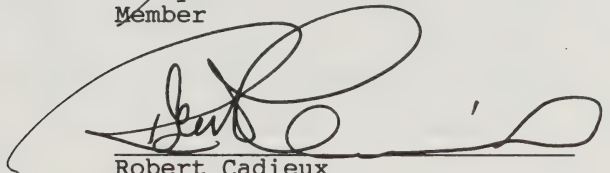
In a case involving the present employer and the Council of Railway Unions, relating to the employer's shopcraft employees (CLRB no. 1020), the Board exercised its discretion against the council of trade unions which had applied for certification in that case. There, the Board had determined that a single unit of shopcraft employees was appropriate for collective bargaining. Previously, the employees in question had come within one or another of seven bargaining units. In dismissing the application in the exercise of its discretion, the Board noted that a fundamental purpose of the Council's structure was the preservation of craft distinctions. While something similar might perhaps be said in the instant case, the effect of such an observation would be different, since the question of increased flexibility of work assignment is not in issue in this case to the extent it was in that case. Another, perhaps more significant, distinction between the two cases is that in the shopcraft case the applicant Council represented (through its constituent trade unions), only a slight majority of the employees in the new unified bargaining unit, whereas in the instant case the applicant Council (through its constituent trade unions) represents virtually all of the employees in the unit. Both from the standpoint of bargaining power as well as from that of collective agreement administration, it is our view that sufficient grounds do not exist to justify the refusal of bargaining agent status to the applicant Council.

The Board has found that the applicant is a council of trade unions within the meaning of the Code. Upon consideration of the evidence of membership (membership in a constituent trade union is, by section 32 of the Code, membership in the council for the purpose of an application for certification), we find that the applicant represents a majority of the employees in the bargaining unit which we have found to be appropriate. As we have noted above, we consider that in the present case our discretion should be exercised in favour of the certification of the Council.

Accordingly, the application is granted. A certificate will issue to the applicant in respect of the bargaining unit described above.


 J.F.W. Weatherill
 Chairman


 Evelyn Bourassa
 Member


 Robert Cadieux
 Member

ISSUED at Ottawa, this 6th day of August, 1993.

CLRB/CCRT - 1025

CAI
L100
- IS2

Information

This is not an official document. Only the Reasons for decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

SUMMARY

Gérard Racine et al.,
complainants, Syndicat des
débardeurs, Local 375 of
Canadian Union of Public
Employees, respondent, and the
Maritime Employers'
Association, employer.

Board file: 745-4002

Decision no. 1026

RÉSUMÉ

Gérard Racine et autres,
plaignants, Syndicat des
débardeurs, section locale 375
du Syndicat canadien de la
Fonction publique, intimé, et
Association des employeurs
maritimes, employeur.

Dossier du Conseil: 745-4002

Décision n° 1026

Complaint of unfair labour
practice. Section 37 of the
Canada Labour Code (Part I -
Industrial Relations). Union's
duty of fair representation.
Seniority. Application of
section 37 to bargaining.
Complaint dismissed.

The union refused to file a
grievance on behalf of a group
of longshoremen who wanted to
challenge the rank they had
been assigned on the job
security list. This rank is
used to determine seniority
with respect to selecting
vacation time. The union
refused to file a grievance
since it believed that
everything had been done as per
the collective agreement.

On several occasions, the
bargaining unit has been
amended to encompass groups
from different units. Whenever
a group was added to the job
security list, it was placed
below the previous one.

The complaint raised two
questions: the union's refusal
to file a grievance and the
negotiation of the list itself.
The Board found that the
refusal to file a grievance did
not violate the Code since it
was based on the wording of the
agreement.

Plainte de pratique déloyale.
Article 37 du Code canadien du
travail (Partie I - Relations
du travail). Devoir syndical
de représentation juste.
Ancienneté. Application de
l'article 37 à la négociation.
Plainte rejetée.

Un groupe de débardeurs s'est
vu refuser le dépôt d'un grief
par leur syndicat. Ils
voulaient contester leur rang
sur la liste de sécurité
d'emploi. Ce rang sert à
déterminer l'ancienneté en ce
qui a trait au choix des dates
de vacances. Le syndicat a
refusé de présenter un grief vu
qu'il jugeait le tout conforme
au texte de la convention
collective.

L'unité de négociation a
plusieurs fois dans le passé
intégré des groupes qui avaient
formé des unités séparées. À
chaque fois qu'un groupe
s'ajoutait à la liste de
sécurité d'emploi, il était
classé à la suite du précédent.

La plainte soulevait deux
questions: le refus du syndicat
de présenter un grief et la
négociation de la liste
proprement dite. Le Conseil a
jugé que le refus de présenter
un grief ne violait pas le Code
parce qu'il était fondé sur le
texte de la convention.

Canada
pour
ations
ard
Conseil
canadien des
ations du
vail

The Board also found that it had jurisdiction in the circumstances to consider the wording of the clause and found that wording chosen was in keeping with a standard collective bargaining practice. The complainants did not demonstrate that the wording was discriminatory. The complaint was dismissed.

En outre, le Conseil a jugé qu'il pouvait en l'espèce étudier le texte même de la clause. Il a jugé que ce texte reflétait une pratique courante en matière de négociation collective. Les plaignants n'ont pas démontré qu'il s'agissait d'un texte discriminatoire. La plainte a été rejetée.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW

Reasons for decision

Gérard Racine et al.,

complainants,

and

Syndicat des débardeurs,
Local 375 of the Canadian
Union of Public Employees,

respondent,

and

Maritime Employers'
Association,

employer.

Board File: 745-4002

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. Yan Romanowski and Ms. Nathaly Toutant, accompanied by
Mr. Gérard Racine et al., for the complainants;

Mr. Luc Martineau, accompanied by Mr. Claude Hétu, union
adviser, for the Syndicat des débardeurs, Local 375 of CUPE;
and

Ms. Manon Savard, accompanied by Ms. Lyne Perron, Director,
Labour Relations, for the Maritime Employers' Association.

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

I

The Board has before it a complaint of unfair labour
practice filed by a group of longshoremen in the port of
Montréal (the complainants) against the Syndicat des
débardeurs, Local 375 of CUPE (the union). The union is
certified to represent all longshoremen in the port of
Montréal who work for the employers who have appointed as

their employer representative the Maritime Employers' Association (the MEA or the employer). The complainants alleged that the union breached its duty of fair representation under section 37 of the Code:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

A hearing in this case began in Montréal on August 25, 1992 and continued on August 26 and 27, 1992, at which time the parties jointly requested that the Board adjourn the hearing sine die to enable them to discuss a possible settlement. The discussions proved fruitless, and the Board reconvened the hearing which concluded on March 9, 1993.

II

The Facts

This case follows a decision to amalgamate the bargaining units in the port of Montréal in 1987 (Maritime Employers' Association (1987), 71 di 77 (CLRB no. 648)).

All complainants are longshoremen who were previously members of Local 1845 of the International Longshoremen's Association (the ILA). The ILA was certified to represent longshoremen in the port of Montréal engaged in what were called "coastal" operations, i.e., domestic longshoring activities. At the same time, ILA Local 375 (not to be confused with CUPE Local 375, which is the current bargaining agent) represented the vast majority of longshoremen in the port of Montréal. They worked in the

so-called "ocean-going" operations, side by side with their fellow longshoremen employed in "coastal" operations.

In 1987, the Board rendered a decision (Maritime Employers' Association (648), supra), upon application by Local 1845, that included in a single bargaining unit all longshoremen in the port of Montréal who thereafter were to be represented by the same bargaining agent. A practical consequence of this decision was to force ILA Local 375 to integrate within its ranks the longshoremen of Local 1845 who until then had been working in the so-called coastal operations. The latter included Mr. Racine and the other complainants.

The integration of "coastal" and "ocean-going" operations was not without problems. It was realized over the opposition of Local 375 which refused at the time to integrate the longshoremen working in "coastal" operations. This opposition led the Board to issue a series of decisions in which in particular Local 375 was very strongly "urged" to integrate this new group without discrimination and with full recognition of length of service (Maritime Employers' Association (648), supra; and Association des employés maritimes, September 15, 1987 (LD 611)). The integration was finally done and a collective agreement was signed in 1989.

A crucial point to note is that this first collective agreement governing the new unit expanded the list of longshoremen entitled to job security by adding to it former Local 1845 members. This list, which has always been appended to the collective agreements, contains the names of all persons who enjoy job security. This is the crux of this complaint. The order in which the names are listed is

negotiated between the employer and the union. This order, which affects other working conditions, is not based on seniority in the port, but rather on acquiring the status of a full-fledged union member. Acquiring this status appears to have always coincided with eligibility to job security.

This list of longshoremen who enjoy job security is one factor that impacts on the choice of vacations. A longshoreman's rank on the list establishes his priority over those below him on the list. The choice of vacations, for example, is made among longshoremen who are otherwise equal, based on the rank of each on this list. By reference, an employee's rank on this list is deemed, under the collective agreement, to be the "seniority" rank. Both parties to the agreement have always described this rank as such. In other words, the seniority rank is determined, not by the date an employee began working in the port, but by the rank assigned him on the job security list. How is this rank assigned? According to the evidence, the same formula has been used for decades. When the longshoremen working in "coastal" operations were integrated, they were added to the list below those who were already members of Local 375.

Even when Local 375 signed the first collective agreement governing the complainants, the latter, who were dissatisfied with the seniority rank they were given, made their dissatisfaction known to the Board by filing an application for review (G. Racine et al. (1990), 80 di 1 (CLRb no. 781)).

There is no need to relate all the details of that application. Suffice it to say that the dissatisfied complainants had instituted a review proceeding. They asked the Board to rescind outright the 1987 certification order

integrating the two groups. They did not allege any unfair labour practice within the meaning of sections 37 or 68 of the Code. Instead, they complained generally of unfair treatment which they sought to remedy through section 18 of the Code.

The Board dismissed that application, first, because it found it inappropriate having regard to the remedy sought and also untimely (G. Racine et al., supra, page 29 et seq.). In a comment that should be put in its proper context, the Board, without deciding the merits of the application, nevertheless urged ILA Local 375 to be careful in renewing the collective agreement and the applicants to be vigilant. In fact, according to the Board, if, during renewal of the collective agreement their length of service was not accurately reflected, it did not rule out the possibility of its examining the matter further, specifically through section 37 of the Code:

"... Without deciding on the merits of a complaint made within the time limits following renewal of the collective agreement, it would appear reasonable in the circumstances to invite the complainants to be vigilant when their collective agreement is renewed, and both the union and the employer to be more careful.

The Board reminds the parties of what it said in Association des employeurs maritimes (LD 611), supra, regarding the seniority list that Local 375 and the employer had to negotiate:

'... Should the seniority list not accurately reflect a longshoreman's length of service, he will avail himself of the grievance procedure against his employer; if his union refuses to represent him or treats him in a discriminatory manner, he will avail himself of provisions of the Code against his union.'

(page 12; translation; emphasis added)

This continues to be the case. The current Local 375 collective agreement contains no definition of seniority. If an employee feels that his position on the list does not accurately reflect his length of service, we do not on the face of it see what would prevent him from filing a

grievance. He must, of course, be able to establish his length of service. ...

...

At the hearing, the president of Local 375 maintained that his organization was planning to apply again to the Board for review of its certification order so as to extend it to currently excluded groups. Without anticipating how such an application may be dealt with by the Board, it is not unlikely that one of the factors that will be considered in such a proceeding is the manner in which Local 375 has integrated, and would in future integrate, longshoremen previously excluded from its unit."

(G. Racine et al., supra, pages 20-22)

Following the conclusion of the 1989 collective agreement, the Syndicat des débardeurs, CUPE Local 375, was created. CUPE, under the direction of former ILA officers, raided the ILA and displaced it as the bargaining agent.

Concurrently, CUPE also displaced the Energy and Chemical Workers Union (ECWU) and the CNTU. CUPE therefore sought the integration of new groups and the expansion of the unit to include the Contrecoeur wharf and bulk cargo operations.

When considering all these proceedings, the Board concluded that the members of Local 375, the employees assigned to handling bulk cargo and the Contrecoeur employees, should all be included in a single expanded unit. In so doing, the Board was bringing together, for all practical purposes, all longshoremen on both shores of the geographic area of the port of Montréal, which extends downstream as far as Sorel, Quebec.

The effect of this decision was to certify CUPE to represent four previously separate groups: ILA Locals 375 and 1845 as well as the Contrecoeur and bulk cargo employees. For the first time, CUPE had to renegotiate the famous job security list. Concurrently with the expansion of the intended scope

of the unit, and owing to what was considered a favourable economic climate, it was decided, for the first time in years, to hire new longshoremen. The bargaining unit was expanded not only to include longshoremen who had previously belonged to separate units, but also to increase the ranks of the unit by adding new members.

During the negotiations of its first collective agreement, CUPE also had to negotiate an appendix on job security. It had to take into account the Board's decision in G. Racine et al., supra.

Some of the new longshoremen added to Local 375 worked in the port in other units that have been in existence for some 40 years. Others were new. When the list of persons eligible for job security was negotiated, CUPE officers asked the employer in the end to use the same formula in drawing up this list as it had always used, i.e., list employees by their date of admission into the unit or into the ranks of the union itself. Consequently, the longshoremen formerly represented by Local 1845, like those employed in handling bulk cargo and the Contrecoeur employees, were necessarily ranked on the list below those longshoremen who were admitted to Local 375 before them. As a result, for the purposes of vacation selection, those admitted last have second choice. This is also the case with the posting of certain positions whenever the employer assigns new primary classifications. This assigning is now done strictly in accordance with the "seniority" rule, i.e., based on an employee's rank on the job security list.

While CUPE ranks the longshoremen in the traditional order, it has nevertheless corrected the list. In fact, the list now shows opposite each longshoreman's name the year he

began working in the port - in short, his length of service for vacation purposes, etc. However, the ranking remains unchanged, with the priority going to those with the longest service in the Local.

The past collective agreements of the old ILA Local 375 always contained the same wording concerning "seniority." In the past, ILA Local 375 had already integrated other "small locals" to use the current expression. And Local 1845 even refused at one time to join this Local.

In short, an examination of the job security list shows that the rank of the longshoremen belonging to Local 375 does not necessarily reflect their length of service. For example, someone who is ranked 800 may have begun working in the port in 1986, while the person immediately below him may have 20 years of service in the port!

We know that the longshoremen with the longest service in the various locals who recently became members of Local 375 are ranked, collectively, below the longshoremen integrated before them, including the members of Local 1845. Thus, longshoremen from Contrecoeur who began working in the port in 1958 are ranked below some longshoremen from Local 1845 who began working in the port later. It is true that the unions that represented these longshoremen before their integration had concluded with Local 375 integration memoranda that provided that their members would occupy that rank in the appendix in question.

When the complainants asked CUPE to dispute, through a grievance, the rank assigned them on the job security list, the reason they gave for doing so was that the list did not

reflect their length of service. When the union refused, they filed their complaint.

III

Arguments

Counsel for the complainants relied essentially on the decisions in Maritime Employers' Association (648), supra; Association des employeurs maritimes (LD 611); and G. Racine et al., supra. In those decisions, the Board had urged Local 375 to ensure that the members of Local 1845 were integrated without discrimination, and in particular with full regard for their length of service. According to counsel, the negotiating by Local 375 of a rank based on the date of admission to the union or of eligibility for job security itself constituted evidence of discrimination. Without using the term, counsel viewed this action as a form of systematic discrimination. Counsel stressed that the absence of a definition of seniority in the collective agreement implied reference to the notion of length of service. Consequently, assigning people a rank not based on length of service necessarily constituted either bad faith or discrimination.

Finally, counsel for the complainants also argued that the complainants were integrated into Local 375 "forcibly" and had therefore not been able to negotiate a memorandum, as the members of the ECWU or the CNTU had done. According to counsel, the absence of such a memorandum denied CUPE the opportunity to rely, in its defence, on the cases of the Contrecoeur employees and the longshoremen employed in bulk cargo handling.

The Board cited earlier the main point of the decision on which Mr. Romanowski relied (page 4).

According to counsel, it followed from this statement that the subsequent negotiation which CUPE conducted and which, in his opinion, did not take into account these comments, contravened these directives and hence breached the duty to represent the complainants fairly.

Mr. Martineau, counsel for the union, for his part, presented various arguments against the application.

First, he argued that the application was untimely under section 97(2) of the Code. According to counsel, the "ground of action" relied on in the instant case originated when the previous collective agreement was negotiated in 1989. The subject of the instant complaint by Mr. Racine and his fellow complainants was not raised at the appropriate time.

Mr. Martineau's second argument goes to jurisdiction. According to counsel, the Board could not substitute itself for the parties in the negotiation of their collective agreement. Section 37 does not allow the Board to intervene in the conduct of negotiations, and the subject of the complaint involved this type of question. He further argued that, under the provisions of the collective agreement, the grievance arbitrator could not intervene, even if ordered to do so, because under clause 5.01(g) he could not depart from the provisions of the agreement:

"5.01 Any dispute with respect to the application or interpretation of the present agreement constitutes a grievance under the terms of this agreement. Such grievance will be settled in accordance with the following procedures:

...

(g) The arbitrator has authority to decide on all questions relative to the interpretation or to the application of the present collective agreement, in addition to the modalities of application and execution of an arbitration decision; but he is not authorized to modify, add to, or delete from or amend any part of this agreement."

Moreover, clause 2 of article 19.01 did not give anyone any discretion.

On the merits, Mr. Martineau stressed that the evidence showed that, both before and after the integration of the members of Local 1845, the union always complied with section 37. The union always applied uniformly the same rule whereby a seniority rank was assigned on the basis of the date of eligibility for job security and of admission to the union. There was nothing illegal per se in the fact that the rule was not length of service in the port. According to counsel, this rule was not necessarily discriminatory because it gave some employees advantages that others were denied. Moreover, counsel concluded everything was relative because, in some cases, this rule favoured the complainants at the expense of others.

IV

Decision

In Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; 9 D.L.R. (4th) 641; and 84 CLLC 14,043, the Supreme Court enunciated what are now the standard rules governing the application of section 37 of the Code:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; 654; and 12,188)

As the Board stated at the hearing, at issue here is whether assigning the "seniority" rank and the union's subsequent refusal to contest this rank at arbitration contravened section 37.

The Board cannot accept the untimeliness argument. We are not dealing with the same union, or even the same agreement.

Much was made during arguments of the fact that the seniority rank does not reflect length of service. The evidence revealed that the precise determination of length of service posed a problem for a number of longshoremen, but not for all.

The Board's role in these matters is determined by the existence of a provision in a collective agreement and its application.

As we pointed out at the hearing, Local 375 (of the ILA and then of CUPE) has always drawn up these job security lists in the manner described earlier, based on the date of eligibility for job security and of admission to the union itself. There is no doubt that, at least for some employees, this rule does not reflect their length of service.

In what way does the refusal by the union to allow an employee to dispute his own rank contravene section 37?

There are two ways of looking at this complaint. The first consists in asking whether the union contravened section 37 (quoted at page 2) in refusing to file a grievance asking, on the complainants' behalf, that the choice of the date of their vacation be based on their actual seniority as employees in the port of Montréal.

The second consists in asking whether the union breached its duty of fair representation by negotiating the famous job security clause. The latter approach raises a number of complex issues. We will first have to determine whether section 37 of the Code applies to the bargaining process. If so, we will have to determine whether the job security list, as constituted, is discriminatory and contravenes section 37 of the Code.

I: Did the union breach its duty of fair representation in refusing to file a grievance on behalf of the complainants?

An examination of key Board decisions dealing with the duty of fair representation set out in section 37 reveals that the test to be applied involves essentially assessing a union's behaviour towards employees. One must then ask whether this behaviour was discriminatory, arbitrary or in

bad faith (John Valiante (1982), 51 di 112 (CLRB no. 395); Gordon Newell (1987), 69 di 119 (CLRB no. 623); Martin Poiré et al. (1987), 72 di 135 (CLRB no. 666); and Gail McDonough (1989), 78 di 28 (CLRB no. 745)), having regard to the nature of the complaint, of the bargaining agent and of the steps taken by the bargaining agent (André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); and Jacqueline Brideau (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550)). It is therefore not a question of determining whether a decision taken by the union was good or bad, with or without merit (Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271); R.V. Passero and W.G. Storry (1982), 48 di 57 (CLRB no. 366); and Clyde Pope (1989), 77 di 68 (CLRB no. 735)).

In the specific case of complaints alleging that a union refused to file a grievance seeking full recognition of seniority, the Board has pointed out before that these cases are more problematic since the union faces a dilemma. Whatever position it takes, someone is going to be unhappy. The Board will therefore take this factor into consideration when it assesses the union's conduct in the light of section 37 of the Code.

In Y.B. Poon et al. (1990), 79 di 156; and 90 CLLC 16,011 (CLRB no. 776), the Board said the following on the subject:

"Generally speaking, when the Board deals with duty of fair representation complaints, a member of the bargaining unit complains that the union has refused to process a grievance to arbitration or has mishandled it during the grievance procedure, such as missing a time limit. This type of complaint is usually straightforward as only the grievor, the union and the employer are seriously affected.

However, when dealing with seniority issues, other employees are almost always affected if a

grievor is successful in having his seniority date changed. In such cases, unions therefore have a double-barrelled shotgun aimed at their heads. No matter what position they take, someone is going to be unhappy.

In Rayonier Canada (B.C.) Ltd., [1975] 2 Can LRBR 196, the B.C. Board had the following to say about conflicts between employees:

'... As Archibald Cox put it:

"... When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of an outside tribunal."

(Cox, Law and the National Labor Policy (1960), at pp. 83-84)'"

(pages 161-162; and 14,133; emphasis added)

In the instant case, the union's refusal to refer the grievance to arbitration is based on the actual text of articles 23.07 and 19.01 of the collective agreement which read as follows:

"19.01

For the purpose of this Article, seniority applies exclusively to employees included in Appendix 'E'.

The employer recognizes the seniority rank indicated for each employee mentioned in Appendix 'E'.

...

23.07

...

(c) Vacations will be given in accordance with seniority and the requirements of each classification, the choice of dates being reserved to the senior employees."

(emphasis added)

At first glance, the union's conduct and its decision per se are without fault from the standpoint of section 37 of the Code. The union did not refuse to file a grievance for arbitrary reasons. It maintained rather that the choice of vacations applied by the employer is in keeping with the actual wording of the collective agreement.

The complainants retorted that, in negotiating Appendix "E" of the collective agreement, the union had actually breached its duty of fair representation.

This argument therefore leads us to a second question relating to section 37: its application to the process of negotiating a collective agreement.

II: Did the union breach its duty of fair representation by negotiating the job security list?

The Application of Section 37 to Bargaining

This question has been the subject of numerous Board decisions. These decisions fall into one of two periods: the period before 1984, when the old text of this section applied, and the period since 1984, when the new text was enacted.

Until 1984, the Board repeatedly held that the duty of fair representation set out in the Code extended to collective bargaining: Luis Rivera et al. (1982), 49 di 86 (CLRB no. 379); Captain William J. Lamore et al. (1982), 51 di 67 (CLRB no. 384); Stanley Warner (1982), 51 di 146 (CLRB no. 403); Dennis Dohm (1983), 52 di 160 (CLRB no. 439); Claude Latrémouille (1983), 53 di 178 (CLRB no. 433); Buddy Lee (1984), 56 di 128; and 7 CLRBR (NS) 56 (CLRB no. 467);

and Nelson G. Burrows et al. (1984), 57 di 205 (CLRB no. 488).

Then, in the summer of 1984, Parliament amended the Code and enacted a new wording of section 136.1 (which became section 37 during the 1985 revision). Subsequent Board decisions initially appear to remove completely and unequivocally collective bargaining per se from the ambit of section 37 (see Gordon Parsley et al. (1986), 64 di 60; 12 CLRBR (NS) 272; and 86 CLLC 16,018 (CLRB no. 555)). Then nuances appeared in the wake of the warning issued in Claude Paquet (1985), 59 di 149; and 85 CLLC 16,053 (CLRB no. 496). In Peter G. Reynolds et al. (1987), 68 di 116; and 87 CLLC 16,011 (CLRB no. 607), the Board distanced itself from the narrow approach taken in Gordon Parsley et al., supra. Certainly, recourse under section 37 presupposes the existence of a collective agreement, but there is nothing in the text to warrant the categorical statement that there could never be any recourse against the actual cause of the discrimination or bad faith.

It was held initially that section 37 applied to the renewal of a collective agreement, but not to the conclusion of a first agreement (see George Harris et al. (1986), 68 di 1; 15 CLRBR (NS) 328; and 86 CLLC 16,059 (CLRB no. 597); and Peter G. Reynolds et al., supra).

This initial opening was essentially based on the decisions in George Harris et al., supra, and Peter G. Reynolds et al., supra. The Board said the following:

"There is no doubt that there is a collective agreement already applying to the employees and that the issues negotiated are part of the administration of the applicable collective agreement. On that very basis, the negotiation

of the July 26 Memorandum would not be excluded from the ambit of section 136.1.

Equally important, however, is the rationale for the exclusion of section 136.1. It is clear that what was intended by Parliament was to ensure that a collective agreement negotiated freely between the parties would not be put at risk by a section 136.1 complaint; what the legislators were intending to protect was the integrity of the collective bargaining process. There had to be some assurance that a freely negotiated collective agreement applying to a bargaining agent and an employer could not be annulled by a section 136.1 complaint.

In the instant case, where the negotiations resulted in the currency of a collective agreement, that same risk does not exist. Should the Board find a violation of section 136.1 with regard to the negotiation of the Memorandum, all that is at risk is the Memorandum itself. The status quo, that is the collective agreement as originally negotiated, would continue to remain in full force and effect until its expiry. The danger of the Board annulling the whole of the collective agreement does not exist."

(George Harris et al., supra, pages 9; 337; and 14,523; emphasis added)

In Peter G. Reynolds et al., supra, it said:

"... Once employee rights have been established in a first collective agreement it is not a big step to construe that thereafter a bargaining agent is representing employees in the bargaining unit, 'with respect to their rights under the collective agreement that is applicable to them,' each time those rights are up for renewal. ... It requires a very narrow interpretation of the wording of section 136.1 to say that in those circumstances the bargaining agent is not representing the employees in the bargaining unit with respect to their rights under the collective agreement that is applicable to them."

(pages 126-127; and 14,107)

In summary, according to this interpretation, section 37 could apply to the negotiation of a memorandum of understanding, an appendix, as well as the renewal of a collective agreement.

In this instant case, what is being disputed through section 37 of the Code is merely the manner of determining the rank

of the employees on the job security list appended to the collective agreement. Indeed, a decision in which the Board cancelled this list and ordered that it be reconstituted according to different rules would not affect the validity of the collective agreement as a whole.

It could also clearly be argued that, in the instant case, the negotiation of the job security list was done as part of the renewal of a collective agreement. In the light of the foregoing, the Board believes that section 37 applies in the instant case.

However, the distinction between the negotiation of a first collective agreement and the negotiation of a second agreement does not withstand scrutiny, with all due respect for the opposing view. According to this interpretation, an employee whom a bargaining agent has represented in bad faith in negotiating a first collective agreement must suffer this prejudice for the full term of the agreement and until it is renewed, has no right to complain. If the cause of this bad faith were perpetuated in a second agreement, the employee might be able to complain! With all due respect, there is, in our opinion, nothing in the text or in the purpose of section 37 to support the adoption of such a narrow and clearly overly legalistic approach.

As the Supreme Court stated in Canadian Merchant Service Guild v. Guy Gagnon et al., supra:

"The duty of representation arises out of the exclusive power given to a union to act as spokesman for the employees in a bargaining unit."

(pages 526; 654; and 12,188; emphasis added)

Moreover, the text of section 37 supports the broad and liberal interpretation prescribed by the Interpretation Act.

Is the job security list negotiated by the union discriminatory?

Counsel for the complainants did not propose any definition to support his allegation of discrimination.

In Daniel Joseph McCarthy, [1978] 2 Can LRBR 105, the Nova Scotia Labour Relations Board proposed the following definition of the notion of discrimination:

"In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S., 1969, c. 11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made. The classic example is a rule excluding all applicants with red hair from some position."

(page 108; emphasis added)

This definition is generally the one recognized by the labour relations boards of Alberta, Ontario and British Columbia (Mark Angus, no. C64/90, March 23, 1990 (BCIRC)).

This Board adopted this definition in Clarence Hynes et al. (1988), 75 di 39; and 88 CLLC 16,056 (CLRB no. 708):

"Those words of then Chairman of the Nova Scotia Labour Relations Board, Professor Innis Christie, have been quoted by various panels of this Board in many instances where the question of whether rules are discriminatory has arisen. It is well established by now that these are the tests which the Board will apply in such situations. This is the first step when deciding whether rules have been applied fairly and without discrimination."

If a rule being applied is in itself discriminatory then it matters not whether the rule is being applied equally and universally, the mere application of a discriminatory rule is a prima facie basis for a breach of section 161.1 of the Code."

(pages 61-62; and 14,400; emphasis added)

We must apply this definition to the instant case and ask ourselves whether making certain seniority rights of a group of employees subject to their admission to Local 375 or their eligibility for job security constituted an "application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable."

In a 1983 case, David Howard, no. 68/83, May 4, 1983, the British Columbia Labour Relations Board had to decide a complaint that a union had breached its duty of fair representation by negotiating in the collective agreement a clause that provided the following:

"Persons unwilling to accept membership in the Union shall have no Union seniority rights, and shall be the first to be released in the event of a layoff. (emphasis added)"

(page 2)

Initially, the B.C. Board held that this clause was discriminatory and allowed the complaint against the union (David Howard, supra). However, it subsequently reversed its decision. It is important to note that the decision was reversed by a reconsideration panel in David Howard, no. 148/84, April 4, 1984 (BCLRB), on the ground that the impugned clause was protected by section 9(1)(b) of the Industrial Relations Act, which is the counterpart of section 68(b) of the Canada Labour Code.

It may also be of interest to note that in B.C. Distillery Company Limited, no. 86/77, December 22, 1977, the British Columbia Labour Relations Board had already stated that it would be arbitrary to grant union members a higher rate of pay than non-union employees:

"... Indeed, the source of the legal duty of fair representation is recognition of the fact that once a union is selected by a majority of the employees, and is thereby given exclusive bargaining authority for all the employees in the unit, there is the potential for the abuse of that authority by discrimination against the minority. Perhaps the most obvious examples are provisions in collective agreements which historically have discriminated against certain segments of the work force: e.g. lower pay rates for female jobs, or separate seniority lists for racial groups. The negotiation of such discriminatory contract terms is prohibited by Section 7 of the Labour Code (as well, of course, by Human Rights legislation). One can easily imagine other examples of totally arbitrary contract classifications - such as higher wage rates solely for union members, who are doing the same work as non-union employees - which would also run afoul of Section 7 of the Labour Code.
..."

(pages 9-10; emphasis added)

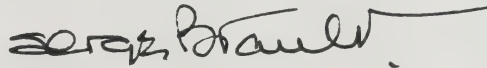
Having said this, we note that those cases differentiate between people who already belong to a unit and those who do not. The instant case is different. It involves recognition of admission into the unit as a criterion for granting certain rights. As well, the degree of priority enjoyed by an employee relates to the employee's date of eligibility for job security.

Collective agreements quite often recognize seniority by department or unit, for example. Moreover, such a provision will not at times recognize service with the employer, but only that outside the bargaining unit (Claude Paquet, supra). It depends entirely on the circumstances.

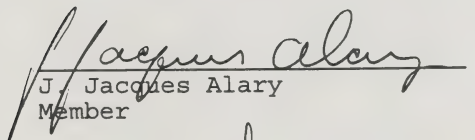
In the instant case, the complainants clearly were influenced by, and relied on Board decisions. However, those decisions must be put in their context, i.e., at the time the outright rejection of the complainants who were being threatened with denial of eligibility for job security.

It is not up to the Board to decide whether the union's interpretation of article 23 is the only possible interpretation. What matters is to recognize, having regard to all circumstances, that the complainants did not establish that this list constitutes discrimination as defined in Daniel Joseph McCarthy, supra.

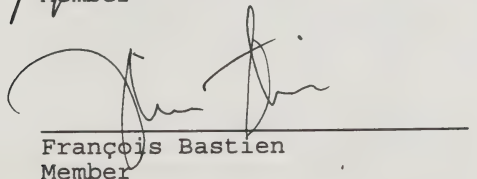
For these reasons, the complaint is dismissed.



Serge Brault
Vice-Chairman



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 10th day of August 1993.

CCRT/CLRB - 1026

Information

Ce document n'est pas officiel.
Seuls les Motifs de décision
peuvent être utilisés à des
fins juridiques.

This is not an official
document. Only the Reasons for
decision can be used for legal
purposes.

RÉSUMÉ

Association des employeurs
maritimes, requérante, Syndicat
des débardeurs de Trois-
Rivières, section locale 1375
du SCFP, et Terminaux
Portuaires du Québec Inc.,
intimés, et Claude H. Foisy,
arbitre, mis en cause.

Dossier du Conseil: 610-129
Décision n° 1027

Secteur du débarquement. Régime
de négociation géographique.
Code canadien du travail
(Partie I - Relations du
travail) (article 34). Demande
présentée en vertu de l'article
65 du Code visant à faire
déterminer si la convention
collective conclue par le
Syndicat des débardeurs de
Trois-Rivières (SCFP) et le
représentant patronal,
l'Association des employeurs
maritimes (AEM) lie Terminaux
Portuaires du Québec Inc. (TPQ)
un des employeurs de l'unité.
Accueillie. Demande
supplémentaire présentée en
vertu du paragraphe 34(7)
visant à clarifier l'autorité
de l'AEM pour conclure la
convention collective. Demande
jugée inutile.

Demande de suspension présentée
par TPQ au motif que
l'ordonnance de désignation de
l'AEM à titre de représentant
patronal fait l'objet d'une
demande de révision judiciaire
qui est toujours en instance.
Le Conseil rejette la demande
en raison du grave préjudice
qu'une suspension des
procédures occasionnerait aux
parties en cause.

Par suite de sa désignation à
titre de représentant patronal
de tous les employeurs liés par
le certificat d'accréditation
géographique délivré le 12 juin
1992, l'AEM a conclu une

SUMMARY

Maritime Employers' Association,
applicant, Syndicat des
débardeurs de Trois-Rivières,
CUPE Local 1375, and Quebec
Ports Terminals Inc.,
respondents, and Claude H.
Foisy, arbitrator, mis-en-
cause.

Board File: 610-129
Decision no. 1027

Longshoring industry.
Geographical bargaining system.
Canada Labour Code (Part I -
Industrial Relations) (section
34). Application filed
pursuant to section 65 of the
Code seeking a determination
that the collective agreement
entered into by the Syndicat
des débardeurs de Trois-
Rivières (CUPE) and the
Maritime Employers' Association
(MEA), the employer
representative, binds Quebec
Ports Terminals Inc. (QPT), one
of the employers of the unit.
Granted. Additional application
filed pursuant to section 34(7)
seeking to clarify MEA's
authority to enter into a
collective agreement.
Application deemed pointless.

Motion to stay filed by QPT on
the grounds that the order in
which MEA was appointed as
employer representative is the
subject of a pending
application for judicial
review. The Board dismissed
the motion because a stay of
the proceedings would greatly
prejudice the parties involved.

Following its appointment as
employer representative for all
the employers covered by the
geographical certification
issued on June 12, 1992, MEA
entered into a collective

convention collective avec le SCFP. TPQ conteste l'autorité de l'AEM de l'avoir signée malgré ses objections et en l'absence de ratification de sa part.

Un examen du libellé de l'unité accréditée et celui utilisé par les signataires de la convention collective pour en décrire l'aire d'application amène le Conseil à conclure que TPQ est une des personnes visées par la convention collective. Afin de déterminer l'effet et la validité de la convention collective signée par l'AEM malgré l'opposition de TPQ, le Conseil a procédé à une analyse du régime général de négociation collective et de ce régime exceptionnel de négociation sectorielle. De nombreuses similitudes existent entre les deux régimes. L'exclusivité de représentation de l'«agent négociateur» syndical et du «représentant patronal» et leur devoir respectif de représentation juste confirment l'intention du Parlement de ne pas assimiler le «représentant patronal» à un «mandataire» ou à un «trustee» mais bien à un «agent négociateur» selon la législation du travail.

Le Conseil juge que la convention collective conclue par l'AEM et le SCFP est valide et qu'elle lie tous les employés et les employeurs de l'unité de négociation, y compris TPQ, et ce, indépendamment de l'opposition de cette dernière.

Étant donné sa conclusion dans le cadre de la demande de renvoi selon l'article 65, le Conseil juge inutile de répéter l'exercice en ce qui a trait à la demande fondée sur le paragraphe 34(7) du Code.

agreement with CUPE. QPT challenges MEA's authority to enter into an agreement in spite of its objections and in the absence of its ratification.

An examination of the description of the certified unit and the wording used by the signatories of the collective agreement to describe its intended scope leads the Board to conclude that QPT is one of the entities covered by the collective agreement. In order to determine the effect and the validity of the agreement signed by MEA in spite of QPT's opposition, the Board analyzed the general collective bargaining system and this special industry-wide bargaining system. There are several similarities between the two. The exclusive right of representation conferred on a "bargaining agent" and on an "employer representative" as well as their respective duty of fair representation confirm Parliament's intention not to consider an "employer representative" as a "legal agent" or a "trustee" but rather as a "bargaining agent" in accordance with the labour legislation.

The Board found that the collective agreement entered into by MEA and CUPE is valid and binds all employees and employers of the bargaining unit, including QPT, regardless of QPT's opposition.

Given its finding with respect to the application made pursuant to section 65, the Board deems redundant the section 34(7) application.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Maritime Employers' Association,
applicant,
and
Syndicat des débardeurs de Trois-Rivières, CUPE Local 1375, and Quebec Ports Terminals Inc.,
respondents,
and
Claude H. Foisy, in his capacity as arbitrator,
mis-en-cause.
Board File: 610-129

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. Robert Cadieux and François Bastien, Members.

Appearances

Mr. Gérard Rochon, for the Maritime Employers' Association; Mr. Yves Morin, for the Syndicat des débardeurs de Trois-Rivières, CUPE Local 1375; and Mr. Luc Huppé, for Quebec Ports Terminals Inc.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

THE PROCEEDINGS

This decision deals with two applications filed on April 14, 1993 by the Maritime Employers' Association (the MEA) pursuant to sections 65 and 34(7) of the Canada Labour Code (Part I - Industrial Relations). In its section 65 referral application, the MEA asked that the Board determine whether:

- (1) Quebec Ports Terminals Inc. (QPT) is one of the parties bound by all of the provisions of the collective agreement entered into on December 8, 1992 with the Syndicat des débardeurs de Trois-Rivières, CUPE Local 1375 (CUPE); and
- (2) the longshoremen who perform work for QPT are also bound by this collective agreement.

The application filed pursuant to section 34(7) of the Code asked the Board to determine a question that arises in connection with the application of section 34(5), i.e., whether the MEA had the necessary authority to enter into, on behalf of QPT, a collective agreement containing provisions not pre-authorized by QPT. If so, the MEA asked the Board to take all measures deemed appropriate to ensure QPT's compliance, once and for all, with the geographic certification provisions of the Code and the obligations arising therefrom.

After examining the documentary evidence and the written submissions filed by all parties, the Board concluded that it could dispose of the two applications without a public hearing. In fact, as we will see later, the determination of the scope of the collective agreement does not turn on facts in dispute between the parties.

II

THE CONTEXT

For a clear understanding of the circumstances that gave rise to the two applications, there is a need to review briefly the proceedings prior to, and following the entering into by the MEA and CUPE on December 8, 1992 of this collective agreement. Its scope is at issue here. For a more detailed review of the history of labour relations in

the ports of Bécancour and Trois-Rivières since 1980, we refer you to the reasons for decision supporting the certification order issued to CUPE (Quebec Ports Terminals Inc. et al. (1992), 93 CLLC 16,035 (CLRB no. 967)), and supporting the appointment order made in respect of the MEA (Quebec Ports Terminals Inc. et al. (1992), 93 CLLC 16,036 (CLRB no. 968)).

On June 12, 1992, the Board certified CUPE as bargaining agent for a multi-employer unit comprising all employers engaged in longshoring in the ports of Bécancour and Trois-Rivières. The reasons supporting that certification order are set out in a decision issued by the Board on October 30, 1992 (Quebec Ports Terminals Inc. (1992), supra). The certification order was issued pursuant to section 34 of Part I, as amended by Bill C-44 (Bill C-44, An Act to amend the Canada Labour Code (geographic certification), 3rd Session, 34th Parliament). According to the parliamentary debates leading to the enactment of that legislation, the bill was needed specifically to resolve the legal impasse endured by the employers and longshoremen in the ports of Trois-Rivières and Bécancour for five years (see in this regard Quebec Ports Terminals Inc. et al. (1992), supra, pages 14,270 and 14,271).

The new section 34, proclaimed on December 5, 1991, reads as follows:

"34.(1) Where employees are employed in

(a) the long-shoring industry, or

(b) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board, the Board may determine that the employees of two or more employers in such an industry in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

(2) No recommendation under paragraph (1)(b) shall be made by the Board unless, on inquiry, it is satisfied that the employers engaged in an industry in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.

(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall, by order,

(a) require the employers of the employees in the bargaining unit

(i) to jointly choose a representative, and

(ii) to inform the Board of their choice within the time period specified by the Board; and

(b) appoint the representative so chosen as the employer representative for those employers.

(4) Where the employers fail to comply with an order made under paragraph (3)(a), the Board shall, after affording to the employers a reasonable opportunity to make representations, by order, appoint an employer representative of its own choosing.

(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all the employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.

(6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts.

(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative."

In the certification order of June 12, 1992, the Board also ordered the employers concerned to choose jointly a representative and to inform it of their choice not later than June 25, 1992, the whole in accordance with section 34(3)(a) of the Code. Since the employers failed to agree on the choice of a representative, the Board, acting pursuant to section 34(4), appointed on October 30, 1992 the

MEA as "employer representative." The reasons for its decision and a formal order recognizing this appointment were issued the same day (see Quebec Ports Terminals Inc. et al. (1968), supra).

On November 27, 1992, QPT, which had proposed an industrial relations firm as representative, asked the Federal Court of Appeal to set aside the appointment order (Court file no. A-1584-92, still pending). It should be noted, however, that QPT did not ask the Federal Court of Appeal to stay the order. More on this subject later.

In the wake of the appointment order, the MEA, the appointed employer representative of the employers included in the certified multi-employer unit, and CUPE, the bargaining agent for the longshoremen working for these employers, commenced bargaining with a view to entering into a collective agreement which they signed on December 8, 1992.

In December 1992 and January 1993, CUPE filed several grievances alleging various contraventions by QPT of the collective agreement. On January 29, 1993, the MEA asked QPT for its comments on the merits of the grievances. QPT's position was clear: the grievances had no merit because they involved clauses it claimed that it had never authorized the MEA to negotiate. It concluded therefore that it was up to the MEA to bear the consequence of the alleged contraventions (letter from counsel for QPT of February 17, 1993). Rejecting this position, and in the absence of additional information from QPT on the grievances per se, on March 18, 1993 the MEA referred a number of these grievances to arbitration before Claude Foisy. On April 2, 1993, the MEA informed the arbitrator of its intention to request a referral to the Board for the purpose of having it determine the question of the existence of the collective agreement and the identification of the parties to it. The

MEA also asked the arbitrator to suspend the hearing of the grievances until the Board had disposed of the questions.

III

REQUEST TO STAY

As part of its preliminary arguments, QPT alleged that the Board lacked jurisdiction to dispose of the MEA's two applications. In fact, it asked the Board not to proceed any further in this file until the Federal Court of Appeal ruled on the validity of the order appointing the MEA (Quebec Ports Terminals Inc. et al. (968), supra), which order it is disputing by way of the above-mentioned judicial review application (Court file no. A-1584-92). The reasons given by QPT in support of its request to stay are numerous.

QPT first alleged that the Board could not dispose of the MEA's applications "because of its alleged lack of objectivity and the appearance of bias specifically with regard to the decision and the order [Quebec Ports Terminals Inc. et al. (968), supra] against which these two motions seek redress (QPT's reply of April 26, 1993, par. 6; translation).

This lack of objectivity and this appearance of bias, it argued, are principally the result of the role and participation of the firm Ogilvy Renault (Ogilvy) in file 555-3208 (geographic certification proceedings). More particularly, QPT alleged that, when the Board issued its decision of October 30, 1992 (Quebec Ports Terminals Inc. et al. (968), supra) and issued the order appointing the MEA as employer representative, it had retained the services of an Ogilvy lawyer to represent it in an application for leave to appeal made in the Supreme Court in Tecksol Inc. (1988), 75 di 130 (CLRB no. 713) (Canada Labour Relations Board v. Attorney General of Canada, file no. 23211, February 4, 1993

(S.C.C.)). According to QPT, counsel authorized by the Board to represent it in the Supreme Court had represented also the MEA on one occasion in geographic certification proceedings. In certifying the MEA represented also by Ogilvy at the same time it had retained Ogilvy in the Tecksol case, the Board had breached a rule of natural justice. Finally, a member of the panel that issued the Tecksol decision was also a member of the panel that issued the decision in Quebec Ports Terminals Inc. et al. (1968), supra, on October 30, 1992 (see the brief submitted by QPT in support of its application for judicial review and produced in support of its reply as Exhibit R-2).

According to QPT, for the Board to hear and determine the MEA's applications before the Federal Court of Appeal disposed of the allegation of appearance of bias on the part of the Board in file 555-3208, would breach the rules of natural justice (QPT's reply, par. 7).

The precariousness of the order appointing the MEA (Quebec Ports Terminals Inc. et al. (1968), supra), the deference to the Federal Court of Appeal, and the potentially academic nature of the Board's decision on the MEA's present applications if the Court set aside the appointment order and the decision in Quebec Ports Terminals Inc. et al. (1968), supra, are other arguments advanced by QPT in support of its request to stay.

In its reply, the MEA pointed out that the effect of an application for judicial review is not to stay proceedings before the Board or the execution of its decisions, which are presumed lawful and valid, until otherwise determined. The MEA stressed that no stay was in force nor had been requested by QPT. The discharging by the Board of its duties and responsibilities under the Code did not constitute a lack of deference to the Federal Court of

Appeal. On the contrary, argued the MEA, were the Board to stay the proceedings on the grounds alleged by QPT, the MEA could institute mandamus proceedings against it.

IV

DECISION ON THE REQUEST TO STAY

QPT's request to stay calls into question the executory nature of Board decisions that are the subject of judicial review proceedings. It is generally recognized that the filing of a judicial review application does not stay the execution of the impugned decision (Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 318 (1971), 22 D.L.R. (3d) 40 (Ont. C.A.), at pages 49-50; Re International Woodworkers of America and Patchogue Plymouth, Hawkesbury Mills (1976), 14 O.R. (2d) 118 (H.C.J.), at page 121; and Re Dylex Ltd. and Amalgamated Clothing & Textile Workers Union Toronto Joint Board et al. (1977), 17 O.R. (2d) 448 (H.J.C.), at page 450). The party disputing the validity of an order or decision must therefore comply with it, in the absence of a stay order.

It is true that section 16(1) of the Code gives the Board the power to adjourn or postpone at any time proceedings before it. However, the Board's policy on this matter is generally to deny a request to stay made on the ground of current judicial proceedings. Exceptionally, the Board will grant a request to stay in clear cases where the Court is about to render its judgment and when the delay will not prejudice the parties concerned. The reasons for this policy were enunciated by a plenary session of the Board in House of Commons et al. (1985), 62 di 225; 11 CLRBR (NS) 43; and 85 CLLC 16,065 (CLRB no. 536):

"The reasons for this general policy are obvious. If a party can prevent the Board from proceeding simply by launching a court challenge, the Code,

and the rights it confers, will for all practical purposes, be undermined. The Board must, before all else, decide the issues that Parliament has mandated it to decide. If the Board is overturned in court, then obviously it must abide by that decision, but unless and until that happens the Board must assume that what it is doing is valid. A party has the right to challenge the Board for an excess of jurisdiction (s. 122 of the Code), but a party can hardly expect the Board to alter its conduct because of a mere allegation of jurisdictional error.

It may be that, in the short run, the Board's resolve to proceed despite a party's resolve to go to court will produce unsettled labour relations. But labour peace is not the only objective of Part V of the Code. In some instances it may be that the rights of the parties to have the Board determine their rights under the Code will have to take precedence."

(pages 233-234; 52; and 14,435; see also Iberia Airlines of Spain (1988), 72 di 222 (CLRb no. 671), page 226; and Canadian Broadcasting Corporation (1993), as yet unreported CLRb decision no. 1004)

In the instant case, QPT did not see fit to ask the Federal Court of Appeal to stay the execution of the order appointing the MEA as employer representative. The rights conferred on the MEA by section 34(5) and arising from the Board's order appointing it employer representative are not precarious. It is therefore on the basis of this order which completed the geographic certification proceeding initiated in October 1990 that CUPE and the MEA entered into negotiations and signed a collective agreement on December 8, 1992.

In the instant case, a stay of proceedings would seriously prejudice the parties involved, and in particular the longshoremen, the majority of whom had been without a collective labour agreement since December 31, 1985, when the collective agreement was signed on December 8. The Board believes that the present and existing right of the signatories to seek clarification of the scope of their agreement is fundamental and must take precedence over the possibility that the Board's decision would be of no effect were the Federal Court of Appeal to set aside the decision

in Quebec Ports Terminals Inc. et al. (968), supra, and the order appointing the MEA. The following remarks of the Ontario Court of Appeal are particularly relevant to the situation in Trois-Rivières and Bécancour: "labour relations delayed are labour relations defeated and denied" (The Journal Publishing Company of Ottawa Limited et al. v. The Ottawa Newspaper Guild et al., judgment rendered from the bench, May 17, 1977 (Ont. C.A.), at page 3).

The Board finds that, to avoid the harmful effect that any further delay could have on labour relations in the ports of Trois-Rivières and Bécancour, it is in the interests of the parties and especially of the longshoremen not to delay further hearing the MEA's applications. Disposing of these applications is especially urgent because the hearings concerning the grievances have been adjourned sine die. For all these reasons, QPT's request to stay is denied.

V

THE REFERRAL APPLICATION

A. The Positions of the Parties

The MEA asked that the Board decide whether QPT is in fact one of the parties bound by all provisions of the collective agreement entered into on December 8, 1992 and whether the longshoremen who work for QPT are also bound by this agreement.

QPT, for its part, argued that it is not bound by the collective agreement because it was signed without its authorization. It equated the powers of the employer representative appointed under section 34 with those of an agent. It further argued that the MEA has not adequately fulfilled its role as appointed employer representative or

agent. It signed the collective agreement over QPT's objections, thereby breaching its duty of fair representation under section 34(6). Although QPT did not file a complaint against the MEA under section 97(1)(a), it nevertheless asked the Board to declare that such a contravention occurred and to censure it implicitly. QPT wrote at paragraph 46 of its reply:

"The MEA alone must bear the consequences of its conduct and the signing of a collective agreement without QPT's authorization. In this regard, without prejudice to the above-mentioned preliminary arguments, and only insofar as the Board considers that it has jurisdiction despite these preliminary arguments, QPT hereby requests that the Board, pursuant to sections 34(6) and 34(7), and in the context of the MEA's applications, declare that the MEA bears all legal consequences of the unauthorized signing of the collective agreement of December 8, 1992 and decide accordingly that QPT is not bound by the provisions of the collective agreement of December 8, 1992 which the MEA signed without the consent and over the objection of QPT and that the MEA alone is bound by these provisions; ..."

(translation; emphasis added)

In support of its written submissions, QPT produced a sworn statement by Alphonse Bélanger, manager of labour relations at QPT, which relates in great detail what Mr. Bélanger describes as the MEA's conduct during negotiation of the collective agreement of December 8, 1992.

In its reply, the MEA took great pains to refute all of Mr. Bélanger's allegations. Moreover, referring to its status as appointed representative of all employers in the ports of Trois-Rivières and Bécancour, it argued that, under section 34 of the Code, it has all the necessary powers to enter into a collective agreement binding all employers of the employees in the unit, including QPT.

CUPE, which supports the MEA's position, asked that the Board issue an order declaring that QPT is bound by all provisions of the collective agreement. The union also

asked the Board to file this order in Federal Court pursuant to section 23 of the Code.

B. Decision

Section 65 of the Code reads as follows:

"65.(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for hearing and determination.

(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding."

In accordance with this section, the Board's role is to answer questions referred to it and then refer the matter back to the arbitrator who, for his part, has jurisdiction to interpret the collective agreement and order, as required, the appropriate remedy (Bell Canada (1981); 43 di 238; [1981] 2 Can LRBR 284; and 81 CLLC 16,099 (CLRB no. 311); and Northern-Loram Joint Venture (1985), 59 di 180; and 9 CLRBR (NS) 218 (CLRB no. 498)). The Board's jurisdiction appears in this regard to be narrower than that of the Ontario Labour Relations Board in the construction industry. The OLRB can, at the parties' request, settle definitively disagreements over the administration of the collective agreement or its alleged contravention. Its jurisdiction in this regard is thus concurrent with that of a grievance arbitrator. This Board does not have this power.

The matter that the Board must decide concerns the identification of the persons bound by the collective agreement signed by CUPE and the MEA on December 8, 1992. In this regard, the conduct of the MEA or QPT during bargaining is not relevant for the purposes of answering the questions relating to the identification of the persons bound by the collective agreement. The Board does not have before it a duty of fair representation complaint and does not intend to comment on or assess the evidence presented by QPT and the MEA concerning each other's conduct.

There is one fact that we must consider first: the existence per se of the collective agreement is not at issue.

The first step in identifying the persons bound by any collective agreement consists in interpreting the certification order that preceded the agreement, as well as the collective agreement per se (Bell Canada (311), supra). If the scope of the collective agreement is the same as the scope of the certification order, then the job of identifying the persons concerned is simplified.

Let us first look at the wording of the description of CUPE's unit contained in the certification order of June 12, 1992:

"all employees involved in loading and unloading ships and other related duties for all employers in the longshoring industry in the geographic region comprised of the ports of Trois-Rivières and Bécancour."

There is similar wording used by the signatories to the collective agreement in article 1.04 to define its scope:

"1.04 The agreement applies to all persons employed in and assigned to, under the clauses of this Agreement, the performance of work under the direction of an employer in connection with the

loading or unloading of ocean-going and coastal ships in the port of Trois-Rivières/Bécancour."

(translation)

Besides describing the unit, the certification order of June 12, 1992 lists the employers engaged in longshoring in the ports of Trois-Rivières and Bécancour. This list includes QPT. We know that QPT actively participated in the process of appointing an employer representative, an exercise that finally led to the decision in Quebec Ports Terminals Inc. et al. (968), supra.

Although the collective agreement was negotiated and signed by the representative appointed under section 34, QPT argued that the agreement cannot lawfully and validly bind it because it contains provisions which QPT opposed. It therefore challenged the MEA's authority to sign the agreement over its objections and the validity of this agreement given that it did not ratify the said agreement.

In conferring on the Board the power to determine any question relating to the existence of the collective agreement, section 65 automatically - indeed, inevitably - gives it the power to determine its validity (Canadian Airline Employees' Association v. Eastern Provincial Airways (1963) Limited et al., [1980] 2 F.C. 512; and (1980), 108 D.L.R. (3d) 743). Moreover, sections 16(p)(vi), (vii) and (viii) read as follows:

"16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

...

(vi) a collective agreement has been entered into,

(vii) any person or organization is a party to or bound by a collective agreement, and

(viii) a collective agreement is in operation."

Under section 34(5), an "employer representative" is deemed to be an employer. As such, it must discharge, on behalf of all employers of the employees in the bargaining unit, all duties and responsibilities of an employer under Part I, including those imposed by section 50(a) of the Code:

"50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; ..."

The employer representative, like any employer or union, is invested, for this purpose, with the powers necessary to discharge these duties and responsibilities. To determine the effect of the collective agreement entered into by the employer representative, we must examine the general collective bargaining system of which the industry-wide bargaining system is a part.

The Board notes first that a collective agreement is, for the individual employees, the product of an act that is both collective and coercive. Its distinguishing feature is the decisive role of the bargaining agent in negotiating, entering into and administering it (Syndicat catholique des employés de magasins de Québec Inc. c. Compagnie Paquet Ltée, [1959] S.C.R. 206; and McGavin Toastmaster Limited v. Bernice Letitia Ainscough et al., [1976] 1 S.C.R. 718).

In the case of a certified union, the monopoly of representation that the status of bargaining agent confers derives first from the presumed wishes of the majority of employees to associate and be represented collectively in negotiating their terms and conditions of employment. To acquire the monopoly of representation which the Code confers, a trade union must, however, obtain the support of the majority of the employees in the unit deemed appropriate (section 28). The resulting certification has, through the operation of the Code, the effect of transmitting employees' individual wishes into collective ones through the bargaining agent. The Board cites in this regard section 36 of the Code:

"36.(1) Where a trade union is certified as the bargaining agent for a bargaining unit,

(a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;

(b) the certification of any trade union that was previously certified as the bargaining agent for any employees in the bargaining unit is deemed to be revoked to the extent that the certification relates to those employees; and

(c) the trade union so certified is substituted as a party to any collective agreement that affects any employees in the bargaining unit, to the extent that the collective agreement relates to those employees, in the place of the bargaining agent named in the collective agreement or any successor thereto."

Besides conferring exclusive authority to bargain collectively on behalf of the employees in the bargaining unit, certification entails a corresponding obligation on the part of the bargaining agent to represent the employees fairly with respect to their rights under the collective agreement (section 37). Finally, a collective agreement entered into by the bargaining agent binds not only the employer and the union, but also every employee in the bargaining unit to which the agreement applies:

"56. A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this Part, binding on the bargaining agent, every employee in the bargaining unit and the employer."

If, under the general collective bargaining system, the collective agreement is, for the employees, a collective act, it is normally an individual act for the employer. However, under the Code, a collective agreement can bind a multiplicity of employers. This is the case with the special multi-employer bargaining systems described in sections 33 and 34 of the Code. The system established in section 33 is one of voluntary membership by employers who belong collectively to an employers' organization. The more specialized system established in section 34 involves the grouping together of employers engaged in longshoring. In this case, their association is forced and is the result of a union initiative.

More particularly, section 33 of the Code empowers the Board to designate an employers' organization as the employer where a union wishes to represent a unit comprising employees of two or more employers who have formed an employers' organization. Before exercising its discretion, the Board must ensure, inter alia, that each employer has in fact delegated to the employers' organization that represents it appropriate authority to enable it to discharge the duties and responsibilities of an employer under Part I. So long as an employer is a member of the employers' organization, it cannot bargain individually with its employees. The designation by the Board of an employers' organization as an employer gives this employers' organization exclusive authority to enter into a collective agreement that then binds all member employers. Since section 33 essentially makes membership voluntary, provision had to be made for an employer's possible withdrawal. Thus,

an employer who ceases to be a member of an employers' organization or who takes away the authority it granted to this organization nevertheless continues to be bound by the collective agreement entered into by the employers' organization (see sections 33(2) and (3)).

In any collective bargaining system sanctioned by the Code, the negotiating and concluding of a collective agreement are the prerogatives of the bargaining agent. This also applies to an industry-wide multi-employer bargaining system. However, in the absence of provisions to this effect, the validity of an agreement thus negotiated is not conditional upon its ratification per se by the employees or the employers it covers. In fact, with the exception of Quebec and Manitoba (The Labour Relations Act, R.S.M. 1987, c. L10, s. 69, and the Labour Code, R.S.Q., c. 27, s. 20.3), where the bargaining agent must by law obtain the employees' consent before entering into a collective agreement, the other provinces and this Board do not impose that obligation. Where there is ratification, it is mostly through a meeting and not by individual employees. Moreover, at this meeting only union members are normally present, not all employees in the unit. Parliament decided to leave this initiative totally to the discretion of unions and employers' organizations without imposing any obligations on them.

The industry-wide bargaining system described in section 34 is similar to the multi-employer bargaining system established under section 33. It has three important features.

First, this system applies to employers engaged in longshoring. The association of such employers is a mandatory and necessary effect of geographic certification

(Maritime Employers' Association (1981), 45 di 314 (CLRB no. 346), page 337).

Second, the appointment of an "employer representative" is mandatory. This representative is chosen by the employers collectively or, if they fail to agree, appointed by the Board. The employer representative represents all employers. To quote QPT, the employer representative "is in fact the 'product' of the forced association of the employers" (QPT's reply, par. 23; translation). The prior existence of an employers' organization within the meaning of the Code is therefore not in this case a prerequisite for industry-wide bargaining, as it is in the case of section 33.

Third, the authority held by an employer representative derives not from a delegation of powers, by a consensus of the employers it represents, but rather from the Code and the appointment ordered by the Board. Section 34(5) explicitly states that appointment by the Board confers on the employer representative appointed all the powers necessary to discharge the duties and responsibilities of an employer under Part I. In short, Parliament intended that the appointment of this representative be equated with certification of a trade union. It is not the employees in the unit who confer on the bargaining agent a monopoly of union representation. This monopoly is the very rationale for collective bargaining and is conferred by the Code.

The features inherent in geographic certification confirm, in our view, Parliament's intention to create an exceptional system that is totally exempt from the common law principles governing trusteeship. Had Parliament intended to rely on the common law, there would have been no need for the Code.

As is the case with employees, the existence of the collective agreement entered into by the employer representative, or the binding effect which the agreement has on the employers, depends not on the individual wishes or even the collective wishes of these employers, but on the Code. Section 34 removes from employers, just as section 36 removes from employees, their individual right to bargain and gives this right exclusively to their representative. Like the union bargaining agent, the employer representative appointed under section 34 has a duty of fair representation (section 34(6)). This duty of fair representation, a new legal obligation which was introduced into the Code on December 5, 1991 with the enactment of above-mentioned Bill C-44 is, in our opinion, an eloquent testament to the relationship between the notions of union "bargaining agent" and "employer representative" appointed under section 34. In our opinion, this confirms Parliament's rejection of the common law notions and rules relating to agent or trustee.

Like the general collective bargaining system, the industry-wide bargaining system established by section 34 imposes no procedure for ratifying collective agreements. The definition of collective agreement contained in section 3(1) of the Code does not make the validity of such an agreement subject to any ratification formality, let alone to the individual wishes of employers or employees included in the unit.

Industry-wide bargaining, introduced by Parliament in 1973, particularly for the longshoring industry, speaks to the will of Parliament to achieve a degree of stability in labour relations in this industry. Parliament decided in 1991, having regard specifically to the situation in Trois-Rivières and Bécancour, that this objective could be fully met only by appointing a single "representative," even if this went against the wishes of individual employers.

Consequently, given the purpose and wording of the Code, the "employer representative" appointed under section 34 cannot be equated with an agent within the meaning of the common law. It follows that one cannot reasonably make the adoption of the agreement that is negotiated and signed subject to any ratification requirement of the kind proposed by QPT, the practical effect of which would be to negate the attainment of the very objective sought by section 34. The facts of the present case demonstrate this unequivocally.

Based on our parallel analysis of the general collective bargaining system and the exceptional industry-wide bargaining system, we conclude that an industry-wide collective agreement entered into by the union bargaining agent and the employer representative duly appointed under the Code binds all employees in the bargaining unit and all their employers, regardless of the wishes of those on whose behalf they act. With all due respect, we believe that this interpretation is the only one that will allow the attainment of the objective of section 34, having regard to the principles governing the general collective bargaining system in Canada.

In the instant case, this means that the collective agreement entered into by CUPE and the MEA on December 8, 1992 meets the requirements of section 3 of the Code and binds its signatories and all employees in the bargaining unit governed by the agreement and their employers. QPT is therefore bound, as an employer, by all provisions of the collective agreement and is subject to them.

The matter is therefore referred back to the mis-en-cause arbitrator, Claude H. Foisy, so that he can dispose of the grievances before him in the light of the instant decision.

VI

DECISION ON

THE MEA'S APPLICATION UNDER SECTION 34(7)

The MEA and QPT both asked that the Board exercise its powers under section 34(7), which reads as follows:

"34.(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative."

Section 34(7) gives the Board jurisdiction to settle any question relating to the application of section 34.

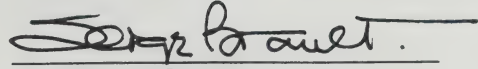
In its application, the MEA's asked the Board to determine whether it had the necessary authority to enter into a collective agreement that contains provisions not pre-authorized by QPT.

The MEA also asked that the Board take all appropriate measures to ensure that QPT complies once and for all with the geographic certification provisions of the Code and the obligations arising therefrom.

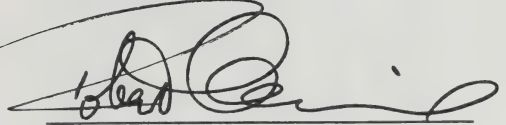
QPT, for its part, also referring in its reply to this section, asked the Board to declare that the MEA must assume all legal consequences of its signing the collective agreement of December 8, 1992.

Given our decision concerning the section 65 referral application, it becomes pointless to repeat the exercise in the case of section 34(7) of the Code. We have already held

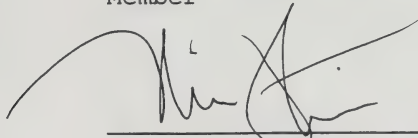
that the collective agreement was valid and in force and
that it was binding on QPT.



Serge Brault
Vice-Chairman



Robert Cadieux
Member



François Bastien
Member

ISSUED at Ottawa, this 16th day of August 1993.

CCRT/CLRB - 1027

information

This is not an official document. Only the Reasons for decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

SUMMARY

Canadian Association of Smelter and Allied Workers, Local No. 4, applicant, and Royal Oak Mines Inc., and Giant Mines Employees Association, respondents, and British Columbia Federation of Labour (CLC); Canadian Area of the International Longshoremen's and Warehousemen's Union; Confederation of Canadian Unions; Canadian Labour Congress; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada); International Association of Machinists and Aerospace Workers; Northwest Territories Federation of Labour, intervenors.

RÉSUMÉ

Association canadienne des travailleurs de fonderie et ouvriers assimilés, section locale n° 4, requérante, Royal Oak Mines Inc. et Giant Mines Employees Association, intimées, et British Columbia Federation of Labour (CTC); Syndicat international des débardeurs et magasiniers, section canadienne; Confédération des syndicats canadiens; Congrès du travail du Canada; Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada (TCA-Canada); Association internationale des machinistes et des travailleurs de l'aérospatiale; Fédération du travail des Territoires du Nord-Ouest, intervenants.

Board Files: 530-2199
530-2200

Dossiers du Conseil: 530-2199
530-2200

Decision no. 1028

Décision n° 1028

Plenary Board Decision.

Décision du Conseil réunie en séance plénière.

Application for reconsideration filed pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) with respect to CLRB decision no. 1010 concerning file 555-3528 and the CLRB decision dated May 6, 1993 concerning file 555-3529 which dealt with applications for certification filed by the Giant Mines Employees Association seeking to displace the incumbent Canadian Association of Smelter and Allied Workers, Local No. 4. Application granted.

Demande de réexamen produite en vertu de l'article 18 du Code canadien du travail (Partie I - Relations du travail) à l'égard de la décision n° 1010 du CCRT concernant le dossier 555-3528 et la décision datée du 6 mai 1993 concernant le dossier 555-3529 du CCRT lesquelles portaient sur des demandes d'accréditation de la Giant Mines Employees Association qui cherchait à remplacer l'Association canadienne des travailleurs de fonderie et ouvriers assimilés, section locale n° 4. Demande accueillie.

The Board, in a plenary session, considered two questions referred to it: (1) Was the appropriate test to determine if a union (here, the Giant Mines Employees Association) is employer dominated or influenced applied in the original decision, pursuant to section 25 of the Code? (2) Was the original panel's conclusion that replacement workers are eligible to participate in the selection of a bargaining agent in compliance with the Code and the Board's policy?

The Board unanimously answered these two questions in the negative.

Issue of employer domination

On the issue of employer domination or influence, the Board found that the relationship between a union and an employer must be examined in order to determine whether or not it is an arm's length relationship. A distinction was made between domination and influence. The Board found that domination in itself implies the lack of an arm's length relationship and that it is therefore in all circumstances prohibited under the Code. Influence, on the other hand, varies in degree and may therefore be permitted under the Code if it does not impair the union's fitness to represent employees in an arm's length relationship.

The Board also reiterated that it will rely on circumstantial evidence to determine whether or not a union is employer dominated or unduly influenced, since direct evidence is rarely available.

Siégeant en séance plénière, le Conseil a examiné les deux questions qui lui avaient été soumises: (1) Les critères appropriés visant à déterminer si un syndicat (ici, la Giant Mines Employees Association) est dominé ou influencé par un employeur ont-ils été appliqués dans la décision initiale, aux termes de l'article 25 du Code? (2) La décision initiale selon laquelle les travailleurs remplaçants ont le droit de participer à la sélection d'un agent négociateur est-elle conforme à la politique du Conseil et aux dispositions du Code?

Le Conseil a répondu à l'unanimité dans la négative à ces deux questions.

Question de la domination patronale

En ce qui concerne la domination ou l'influence exercée par un employeur, le Conseil estime qu'il faut déterminer si la relation qui existe entre un employeur et un syndicat comporte ou non un lien de dépendance. Il fait une distinction entre «domination» et «influence» et conclut que la domination en soi sous-entend l'existence d'un lien de dépendance et qu'elle est donc systématiquement interdite en vertu du Code; par ailleurs, l'influence peut varier en intensité. Si elle ne compromet pas l'indépendance du syndicat dans sa représentation des employés, elle peut être permise aux termes du Code.

Le Conseil a également réaffirmé qu'il s'en remettra à des éléments de preuve indirecte pour déterminer si un syndicat est dominé ou influencé par un employeur, puisque des éléments de preuve directe peuvent rarement être recueillis.

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

The original panel will review the evidence heard in both files 555-3528 and 555-3529 in light of this policy and determine whether or not the Giant Mines Employees Association is employer dominated or influenced.

Replacement Workers

With respect to the second issue, the Board determined that replacement workers hired during a strike or a lockout are not to be included in the bargaining unit. The Board has further determined that replacement workers hired during a strike or a lockout do not have the right to take part in the selection of a bargaining agent for the bargaining unit engaged in a strike or lockout.

Concerning the appropriateness of the bargaining unit, the Board first recognized that replacement workers only have temporary status pending the return of the incumbents of the positions (the strikers). The Board then held that there is no community of interest between replacement workers and the incumbents of the positions. On the contrary, their interests are considered by the Board to be squarely opposed to that of the permanent work-force.

The Board also found that the bargaining unit is "fixed" by sections 24(3) and 38(5) of the Code during a strike or a lockout to be the complement involved in the negotiations at the outset. It is to remain such until the settlement of the dispute. Consequently, all workers hired during the dispute remain outside the unit until the parties negotiate an agreement as to their status.

The Board also examined the eligibility of replacement workers to participate in the selection of a bargaining agent, although their exclusion

Le banc de membres initial réexaminera la preuve entendue dans les dossiers 555-3528 et 555-3529 à la lumière de cette politique et déterminera si la Giant Mines Employees Association est ou non dominée ou influencée par l'employeur.

Travailleurs remplaçants

En ce qui concerne la deuxième question, le Conseil a conclu que les travailleurs remplaçants embauchés au cours d'une grève ou d'un lock-out ne doivent pas être inclus dans l'unité de négociation. Il a aussi conclu que ces personnes n'ont pas le droit de participer à la sélection d'un agent négociateur pour l'unité de négociation en grève ou en lock-out.

Le Conseil a d'abord reconnu, pour ce qui est de l'habileté à négocier de l'unité, que les personnes qui remplacent des employés en grève sont embauchées temporairement, en attendant le retour des titulaires des postes (les employés en grève). Le Conseil a ensuite déclaré qu'il n'y a aucune communauté d'intérêt entre ces deux groupes. Au contraire, il estime que leurs intérêts sont diamétralement opposés.

Le Conseil a aussi conclu que, au cours d'une grève ou d'un lock-out, les paragraphes 24(3) et 38(5) du Code fixent la composition de l'unité de négociation et la limite au groupe qui était visé au départ par les négociations. Elle demeure inchangée jusqu'à la fin du conflit de travail. Les personnes embauchées en cours de conflit demeurent exclues de l'unité tant et aussi longtemps que les parties n'ont pas convenu de leur statut.

Le Conseil s'est aussi penché sur l'admissibilité des personnes qui remplacent des employés en grève à participer à la sélection d'un agent de

from the bargaining unit would suffice to dispose of this issue.

Since the file shows that the Giant Mines Employees Association does not have majority support of the employees in the unit determined to be appropriate by the full Board, the Board confirms, albeit for different reasons, the original panel's decision to dismiss the application in file 555-3528 notwithstanding the original panel's finding on the issue of employer domination.

négociation, bien que leur exclusion de l'unité de négociation suffise pour trancher la question.

Puisque le dossier révèle que la Giant Mines Employees Association n'a pas l'appui de la majorité des employés membres de l'unité habile à négocier, le Conseil, réuni en plénière, confirme, bien que pour des motifs différents, la décision du banc initial de rejeter la demande d'accréditation relative au dossier 555-3528 indépendamment de la décision du banc initial quant à la question de domination.

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Association of Smelter
and Allied Workers, Local
No. 4,

applicant,

and

Royal Oak Mines Inc.,
and
Giant Mines Employees
Association,

respondents,

and

British Columbia Federation of
Labour (CLC); Canadian Area of
the International Longshoremen's
and Warehousemen's Union;
Confederation of Canadian
Unions; Canadian Labour
Congress; National Automobile,
Aerospace and Agricultural
Implement Workers Union of
Canada (CAW-Canada);
International Association of
Machinists and Aerospace
Workers; Northwest Territories
Federation of Labour,

intervenors.

Board File: 530-2199
530-2200

The Board was composed of Mr. J.F.W. Weatherill, Chairman;
Mr. Serge Brault, Ms. Louise Doyon, Mr. J. Philippe
Morneault, Mr. Jean L. Guilbeault, Q.C., Mr. Richard I.
Hornung, Q.C., Vice-Chairs; Mr. Calvin B. Davis, Mr.
Robert Cadieux, Mr. Michael Eayrs, Mr. François Bastien,
Ms. Mary Rozenberg, Mr. Patrick H. Shafer, Ms. Véronique
L. Marleau and Ms. Sarah FitzGerald, Members.

Appearances (on record)

Mr. Leo McGrady, Ms. Gina Fiorillo and Mr. Harry Seeton,
for the applicant;

Messrs. Michael A. Coady and Bill Heath, for Royal Oak
Mines Inc.;

Messrs. Israel Chafetz and Jim O'Neil, for the Giant Mines
Employees Association;

Ms. Angela Schira, for the British Columbia Federation of
Labour (CLC);

Mr. Gordon S.C. Westrand, for the International Longshoremen's and Warehousemen's Union;
Mr. John B. Lang, for the Confederation of Canadian Unions;
Mr. Lewis Gottheil and Peter Kennedy, for the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada);
Mr. Valerie E. Bourgeois, for the International Association of Machinists and Aerospace Workers;
Messrs. Gaston Nadeau and Robert McGarry, for the Canadian Labour Congress and
Messrs. Gaston Nadeau and James M. Evoy, for the Northwest Territories Federation of Labour.

I

The Canada Labour Relations Board held a Plenary session on July 27, 1993 to examine an application by the Canadian Association of Smelter and Allied Workers, Local No. 4 (hereinafter the "CASAW"). CASAW applied on May 25, 1993 for reconsideration of Royal Oak Mines Inc. (1993), as yet unreported CLRB decision no. 1010 concerning file no. 555-3528 and of the decision dated May 6, 1993 file no. 555-3529, also concerning Royal Oak Mines Inc. These two decisions were rendered by a panel of the Board composed of Mr. J.F.W. Weatherill, Chairman and Mr. Michael Eayrs and Ms. Mary Rozenberg, Members (hereinafter the "original panel") on May 5, 1993.

In its decision in file no. 555-3528, the original panel made the following findings, among others:

- (1) That the Giant Mines Employees Association (hereinafter the "Association") is not employer dominated or influenced within the meaning of section 25(1) of the Code; and
- (2) That the strike replacement workers be included in the bargaining unit and be eligible to participate in the selection of a bargaining agent.

Following the Board's procedure in reconsideration matters where important issues are raised, (British Columbia Telephone Company (1979), 38 di 124, at page 141; [1980] 1 Can LRBR 340 at 353; and 80 CLLC 16,008, at page 14,117 (CLRB no. 220), a reconsideration panel comprised of Vice-Chairs Serge Brault, J. Philippe Morneault and Jean L. Guilbeault, Q.C., was appointed to determine whether or not a Plenary Board session was warranted. They determined that it was and referred the following questions for final disposition:

"1. a) Did the original panel apply the appropriate test pursuant to section 25 of the Code in order to determine if a 'trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired'?

b) In the negative:

Having regard to the facts before the original panel, was their conclusion that the Giant Mines Employees Association was not employer dominated or influenced, made in compliance with the Code and Board policy?

2. Was the original panel's decision to include replacement workers in the selection of a bargaining agent in compliance with the Code and the Board's policy?

Regarding the second question, the reconsideration panel has determined that even if the first question were answered in the affirmative, the second question would still need to be addressed by the plenary session of the Board by reason of its major incidence on collective bargaining under federal jurisdiction. ..."

(Royal Oak Mines Inc., June 30, 1993 (LD 1183), page 4)

Prior to this decision, the Board never had the opportunity , in a Plenary session, to address these policy issues .

CASAW's reconsideration application prompted a number of labour organizations to seek intervenor status, pursuant to section 12 of the Board's Regulations (1992). They

were particularly concerned with the second question because of its fundamental importance to the labour relations community and its legal and policy implications . These organizations are:

- British Columbia Federation of Labour (CLC);
- Canadian Area of the International Longshoremen's and Warehousemen's Union;
- Confederation of Canadian Unions;
- Canadian Labour Congress;
- National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada);
- International Association of Machinists and Aerospace Workers;
- Northwest Territories Federation of Labour.

These organizations were granted the standing of amicus curiae by the reconsideration panel (Royal Oak Mines Inc. (LD 1183), supra). On the same occasion, and in order to obtain the views of both sides of the Labour Relations Community, the Board also invited the following employer organizations to file submissions on the issue:

- Federally Regulated Employers - Transportation and Communication/ (FETCO);
- Canadian Manufacturers' Association;
- Business Council of British Columbia.

None of these employer organizations responded to the Board's invitation.

The Board also received submissions from a group identified as the Canadian Association of Labour Lawyers in support of the reconsideration application.

Following consideration of all the submissions made and discussion of the issues, the full Board came to the conclusion that the findings of the original panel on the two questions referred above need to be reviewed.

II

Question 1: Employer Domination

Union independence from management is central to the proper operation of our free collective bargaining system. Its importance is illustrated by the fact that employer domination or influence of a trade union is prohibited by two separate sections of the Canada Labour Code, Part I: sections 25 and 94(1). In the first instance, the Board itself is prohibited from certifying a trade union which is employer dominated or influenced (section 25). In the other, an employer is prohibited from providing "any support" to a trade union under the provisions dealing with unfair labour practices (section 94(1)). This will prevent established unions from bypassing the provisions of section 25. Sections 25 and 94(1) of the Code read as follows:

"25. Notwithstanding anything in this Part, where the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired, the Board shall not certify the trade union as the bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that applies to any such employees shall be deemed not to be a collective agreement for the purposes of this Part.

...

94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

(b) contribute financial or other support to a trade union."

Both these sections have the same objective. They are aimed at ensuring the independence of trade unions vis-à-vis employers (and vice versa, under the terms of section

95(c)). In collective bargaining, management and labour often have conflicting interests. The employer is the payer of wages and the trade union is the bargaining agent for the employees earning these wages. The process designed to bring about a socially acceptable sharing of the fruits of labour is known, in a free society, as free collective bargaining. That system is essentially based on each side's ability to organize and eventually resort to economic pressure through a strike or lockout to bring about a mutually acceptable set of conditions of employment known as a collective agreement. The necessity to maintain each side's independence is aimed at preserving the integrity of the system. Without independent unions, there can be no free collective bargaining, and that is one of the Code's main objectives as established in its Preamble :

"Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

And whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

And whereas the Government of Canada has ratified Convention n° 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;

And whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;
..."

In many cases, the Board has referred to section 25 of the Code as implying a two-fold test to determine if a trade union is employer dominated or influenced (CJRC Radio

Capitale Ltée (1977), 21 di 416; [1977] 2 Can LRBR 578; and 78 CLLC 16,124 (CLRB no. 89); Air West Airlines Ltd. (Air West Operations Ltd.) (1980), 39 di 56; and [1980] 2 Can LRBR 197 (CLRB no. 231); and Reimer Express Lines Ltd. et al. (1979), 38 di 213; and [1981] 1 Can LRBR 336 (CLRB no. 226)).

Although the wording of section 25 may vary from that found in other jurisdictions¹, the ultimate test is basically the same everywhere. The threshold test to be applied in this jurisdiction, much like in all provincial jurisdictions, in order to determine if a trade union is dominated or unduly influenced by the employer, is whether there exists a proper **arm's length relationship** between the trade union and the employer. That question has been, in the Board's view, properly enunciated by the British Columbia Labour Relations Board in McCoy Bros. Ltd., [1977] 1 Can LRBR 450:

"... The scheme of the Code, in part, is the

¹ For example, the Ontario and British Columbia provisions read:

"13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code or the Canadian Charter of Rights and Freedom."

(Labour Relations Act, R.S.O. 1990, c. L.2; emphasis added)

"31. An organization or association of employees

(a) the formation, administration, management or policy of which is, in the board's opinion, dominated or influenced by an employer or a person acting on his or her behalf or

...

shall not be certified for the employees, and an agreement entered into between that organization or association of employees and the employer shall be deemed not to be a collective agreement."

(Labour Relations Code, S.B.C. 1992, c. 82; emphasis added)

"... The scheme of the Code, in part, is the evolution of an equality of bargaining strength. The thought expressed in s. 50(a) of the Code is simply a part of that scheme. Really, then, the Board should be asking itself this question: can we be satisfied that a sufficient arm's length relationship exists so that meaningful collective bargaining - the kind of collective bargaining contemplated by the Code - can be undertaken and sustained? That, admittedly, is a subjective judgment. The whole of the evidence must be examined and inferences carefully drawn."

(page 455; emphasis added)

Recognizing the combined effect of sections 25, 37 and 94(1) of the Code, that issue was properly described by the Board in Air West Airlines Ltd (Air West Operations Ltd.), supra:

"... The combined effect of section 134(1) [now section 25], 136.1 [now section 37], which directs a union to represent employees without discrimination, and section 184(1) [now section 94(1)], which prohibits employer's interference in the administration and formation of a union and in the representation of employees by the trade union, is intended to assure that the relation between employer and a trade union be an independent one. The collective bargaining envisioned by the provisions of the Canada Labour Code is one of arm's length relation."

(pages 90; and 224-225; emphasis added)

Employer domination relates directly to a trade union's ability to represent employees in a bargaining unit and consequently to the union's capacity to freely conclude a collective agreement with management. Union representation will fulfil the Code's objective of free collective bargaining if the trade union involved is unequivocally freely chosen by employees. This in turn guarantees that, ultimately, it is the employees who govern the union's actions, particularly in the central issue of collective bargaining.

For the system to operate properly, it is also imperative that employees **perceive** that a trade union seeking their support is an institution totally independent of management, capable of asserting their claims and enforcing their interests. That requirement has been correctly stated by the Board in Graham Cable TV/FM (1986), 67 di 57; 14 CLRBR (NS) 250; and 86 CLLC 16,047 (CLRB no. 588):

"... In order for a trade union to function as such, there must be a proper arm's length relationship between itself and the employer and not only must that arm's length relationship exist, it must be seen to exist in the eyes of its employees. ..."

(pages 73; 267; and 14,448; emphasis added)

The Ontario Labour Relations Board has also adopted a similar purposive approach to section 13 of its Labour Relations Act:

"The purpose of the section, in keeping with the scheme of the Act, is to maintain the necessary arm's length relationship between employers on the one hand, and trade unions, as representatives of employees, on the other. ...

...

... The purpose of the section is to prevent the certification of a trade union which is party to a 'sweetheart deal' with an employer or is the recipient of employer support so that it does not owe its sole allegiance [sic] to those whom it is certified to represent. The Board has consistently applied the section having regard to its underlying purpose."

(Adidas Textile (Canada) Ltd., [1980] OLRB Rep. May 639, pages 643-644; emphasis added)

This approach was also followed in Tri-Canada Inc., [1981] OLRB Rep. Oct. 1509, where the Board found that the provision to an employee organization of an employee list was "employer support" contrary to section 13 of the Act:

"15. The bargaining process between employers and employees always implies, in addition to their common interest, some degree of conflict between the immediate economic interests of the bargainners - the payer and receiver of wages. This conflict of interest will necessarily co-exists [sic] with their common interest in the welfare of the enterprise from which they both derive their income; and we do not mean to suggest that harmonious relations do not exist between employers and trade union. But short-run conflicts of economic interest are inevitable, and if they are to be resolved through the process of collective bargaining, it is highly inappropriate for the agency which represents one party to the bargain, to be in any measure under the influence of the other. Collective bargaining by its very nature requires an arm's length relationship between the bargaining parties, and there are a number of statutory provisions designed to ensure that this is the case. ..."

(pages 1512-1513; emphasis added)

The Board agrees with that statement of policy. Arm's length, between labour and management, is a necessary ingredient of collective bargaining in this jurisdiction as much as it is in the provincial ones. It constitutes the threshold at both levels. In that sense, the Board does not see how a trade union could be found to be employer dominated in a provincial jurisdiction and not be so found under the federal regime.

The compound effect of sections 25 and 94(1), as described above, is that any degree of domination suffices to trigger section 25, since it impairs a union's fitness to represent employees. Domination implies the lack of an arm's length relationship. In and of itself, it is sufficient to justify denying a so-called trade union the right to represent employees.

On the other hand, "employer influence" calls for a distinction. First, the influence referred to is something different than domination. Second, it has to be a form of influence that affects the bargaining agent's independence.

Obviously, employer influence is constant within the workplace, if only because the employer manages it. This is of course not the kind of influence that the Code is concerned with. The Board notes that the two-fold test often referred to in section 25 cases is more appropriately applied to the notion of employer influence.

Since influence varies in degree and is not as precise as domination, it is normal that the degree of influence be assessed by the Board. Such is not the case for domination, which is defined by the Webster's Ninth New Collegiate Dictionary, 1991, as "supremacy or preeminence over another". Domination clearly implies a relationship of dependence of the trade union vis-à-vis the employer.

Eventhough not decisive, the following may also be said in reference of the text of the statute. The French version of section 25 conveys probably more readily that distinction in that it may be read as incorporating a notion of degree in the case of influence but not in the case of domination. Indeed in French, the expression "au point que " may be read as applying only to the verb "influencé" and not to the verb "dominé".

"25.(1) Malgré toute autre disposition de la présente partie, le Conseil ne peut accorder l'accréditation s'il est convaincu qu'un syndicat est dominé ou influencé par l'employeur au point que son aptitude à représenter les employés dans le cadre des négociations collectives est compromise; le cas échéant, toute convention collective qui aurait été conclue par le syndicat et l'employeur pour s'appliquer aux employés ou à certains d'entre eux est tenue pour inexistante dans le cadre de la présente partie."

(emphasis added)

As stated by the Supreme Court of Canada in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at page 1071:

"... an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code."

Section 12 of the Interpretation Act, R.S.C., 1985, c. I-21, provides as follows:

"12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

Thus, the notion of degree, implied in the English version of section 25 of the Code by the wording "so dominated or influenced... that the fitness", must be read in a manner that is compatible with its French counterpart.

The Alberta provision, for instance, is probably more explicit since it clearly separates the two notions:

"36(1) A trade union shall not be certified as a bargaining agent if its administration, management or policy is, in the opinion of the Board,

(a) dominated by an employer, or

(b) influenced by an employer so that the trade union's fitness to represent employees for the purposes of collective bargaining is impaired."

(Labour Relations Code, S.A. 1988, c. L-12; emphasis added)

The bottom line is that the Board will not, in any circumstance, certify a trade union that is employer dominated or a trade union that is influenced by an employer to such an extent that its fitness to represent employees is impaired. It must not do so because in either case, a union's ability to negotiate is impaired where it is not at arm's length with management.

It is not clear from the original decision whether or not the panel considered the key issue of whether employer domination or sufficient influence destroyed the arm's length relationship which must exist between Royal Oak Mines and the Giant Mines Employees Association.

In this respect, the issue of proof needs to be briefly addressed. In cases of allegations of employer domination or influence under section 25 or 94, the Board needs to rely on circumstantial evidence since direct evidence is rarely available:

"Since the Code prohibits the domination or the financing of a trade union by an employer or any interference on his part, employers seldom openly encourage the creation of a trade union or contribute financial support to this end. Similarly, since a trade union that is dominated or influenced by an employer is liable to be refused certification, unions are unlikely to disclose readily any ties they may have with employers. Only rarely do we find a party admitting to having violated the provisions of the Code or openly engaging in prohibited activities. ..."

(CJRC Radio Capitale Ltée, supra, pages 432; 591; and 360)

"In this type of case, as in cases of dismissal for union activities, we do not expect to receive direct evidence that the employer has dominated, influenced or initiated the establishment of a Union, or that the dismissal is related to an employee's union activity. In such cases, we must base our decision on our assessment of the circumstantial evidence which is submitted to us. It is only in exceptional cases, as we have just mentioned, that direct evidence will be available. ..."

(Cabano Transport Ltd. (1981), 42 di 318 (CLRB no. 294), pages 333-334)

For all these reasons, the full Board has come to the conclusion, on the issue of domination, that the original panel did not apply the appropriate test.

Accordingly, the original panel is to review the evidence in both files 555-3528 and 555-3529 in light of the above

policy statement and determine whether, in the circumstances, the Giant Mines Employees Association is prohibited from certification under section 25.

III

Question 2: Replacement Workers

We now turn to the issue of the eligibility of replacement workers to participate in the selection of a bargaining agent. This part of the decision does not apply to file no. 555-3529 since the members of this unit, namely the security guards and first aid attendants, were not on strike at the time the application was filed.

The question of employee replacement is of crucial importance as it is central to the overall collective bargaining process. As already noted by the Board in Arthur T. Ecclestone (1978), 26 di 615; [1978] 2 Can LRBR 306; and 78 CLLC 16,142 (CLRB no. 132):

"These fine questions about when a strike is no longer a strike and whether replacement employees may participate in a decision or actually make a decision to remove or displace the union representing persons they replace are serious fundamental questions of policy in our collective bargaining system. ..."

(pages 626; 314; and 514; emphasis added)

The Code does not define "replacement employees" nor does it exclude them from the definition of "employee" at section 3(1):

"'employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."

In these Reasons, a replacement employee is defined as anyone who was not in the bargaining unit at the start of the labour dispute. The term would not apply to original members of the bargaining unit who, for whatever reason, go back to work before the dispute is resolved. Such employees are simply not replacements as they are not taking anyone else's place, but basically resuming the positions which they held prior to the strike or lockout.

The Board has considerable discretion in developing a policy on this issue. Any policy we may devise will displease some; nevertheless, it must be crafted in such a way as to best meet the main purpose of the Act which is to recognize "freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations".

A distinction must first be made. Employee eligibility vis-à-vis the selection of a bargaining agent is quite distinct from that of employee inclusion in an appropriate bargaining unit. As already stated by the Board in Société Radio-Canada, June 2, 1993 (LD 1165):

"In applying section 30(1)(a), the Board inevitably gives itself a set of rules to decide who will vote. The definition of the appropriate bargaining unit and the establishment of the list of eligible voters must not be confused. They are two separate concepts. ..."

(page 3; translation; emphasis added)

In the instant case, the original panel found that the description of the bargaining unit of employees appropriate for collective bargaining should be identical to the one for which CASAW is already certified. Then, it

determined that the unit so defined included all replacement workers.

The original panel's description of the bargaining unit was certainly in accordance with Board policy and practice. It was, as the original panel put it (also at page 5 of the decision), "within the membership of that unit that the applicant must establish majority status if it is to displace the incumbent as bargaining agent for those employees." The original panel went on to distinguish the issue of the definition of a bargaining unit from that of its complement. It wrote that:

"... Issues of 'community of interest' and of the inclusion or exclusion of particular employees are dealt with at the time the bargaining unit is determined. Once the unit is determined and until it is changed, those issues are irrelevant to any questions of membership in a particular unit; such questions are determined on the basis of employment status and reference to the existing unit description. They are essentially questions of fact, not of policy."

(pages 10-11)

This led the original panel to conclude that as a matter of fact persons hired after the commencement of the strike - persons who are admittedly employees - would necessarily come within the definition of the bargaining unit by reason of the jobs they perform. As they were found to be members of the bargaining unit, they were in the view of the original panel, entitled to a voice in the selection of the bargaining agent. The original panel noted that since a certified trade union has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit by virtue of section 36(1) of the Code, this "means all employees in the unit, and it means the unit as determined by the Board, for as long as it continues to exist" (page 8). The original panel concluded that at "the time this application was made, the

bargaining unit in this second sense [the sense of 'membership' as opposed to the sense of 'definition'] included, in fact, both the strikers and the replacement workers." (page 11)

It is the view of the whole Board that the notion of bargaining unit including, by virtue of its definition, all persons who may become employees and perform "bargaining unit" work is based on an overly literal rather than a purposive reading of the material provisions of the Code. In the present circumstances, where a legal strike is in effect and where that strike involves members of the bargaining unit for whom the incumbent trade union has exclusive bargaining rights, it cannot properly be said that the replacement workers become members of the bargaining unit simply by virtue of their being hired. If that were so, the incumbent union would (as the original panel appears to have considered) have exclusive bargaining rights² with respect to them, and it would not have been open to the employer to negotiate separately, as of course it has done, with the new employees. Such a consequence, which was not contemplated by the original panel is, we find, inconsistent with the scheme of the Code.

We will first address the issue of the status of replacement workers vis-à-vis the bargaining unit before deciding their role, if any, in the selection of a bargaining agent for the unit in question.

²

McGavin Toastmaster Ltd. v. Ainscough [1976] 1 S.C.R. 718; Syndicat catholique des employés de magasin de Québec Inc. v. Compagnie Paquet Ltée [1959] S.C.R. 206.2

A: Replacement Workers' Status and
the Appropriateness of their Inclusion in
or Exclusion from the Bargaining Unit

In order to properly assess all the major implications of this matter, it is imperative that it be put in the proper context of a labour dispute. Initially, negotiations take place. At a stage where negotiations reach an impasse, the employer and the bargaining agent consider exerting economic pressure to force the other party to a compromise. Strikes or lockouts are both aimed at causing economic hardship and effecting such a compromise. This is where replacement workers come into play. The employer's decision to use replacement workers to keep the business running reduces the pressure of a strike or alternatively increases that of a lockout. The ultimate purpose is to conclude the dispute with the bargaining agent and, eventually to resume normal operations. The purpose, as contemplated by the Code, is not to permanently substitute the replacements for the permanent workforce.

Labour Boards in Canada have generally rejected the United States approach towards replacement workers which recognizes the employer's right to hire permanent replacement workers during economic strikes: See NLRB v. Mackay Radio & Telegraph Co. (1938), 304 U.S. 333. That judgment has since been followed in the United States (see Belknap, Inc. v. Hale et al. (1983), 463 U.S. 491) and has spawned many debates on the subject (see Seminar: Employee Rights in a Changing Economy, The Issue of Replacement Workers, Economic Policy Institute, Washington, D.C., 1991, 141 pages; Michael H. LeRoy, "Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert and Cartelization" (1993), 34 Bost. Coll. L.R. 257; Charles W. Baird, "On Strikers and Their

Replacements" (1991), 12 Govt. Union Review 1 (No. 3); and "One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine" (1993), 106 Harvard L.R. 669). Simply put, in the U.S., a striker may lose his or her job to a replacement worker during economic strikes.

In Canada, the position is different and, in our view, generally to be preferred. In this country, when they are not banned, replacement workers are only recognized as having a temporary, precarious status. In the three largest provinces, the use of replacement workers is prohibited (Labour Code, R.S.Q., c. C-27, s. 109.1; Labour Relations Code, S.B.C. 1992, c. 82, s. 68; Labour Relations Act, R.S.O. 1990, c. L.2, ss. 73.1-73.2). Elsewhere, replacement workers are generally considered to be temporary employees. Such a status flows from the employment protection afforded to strikers or locked-out employees that explicitly ensures their reinstatement after the dispute is over (Labour Relations Code, S.A. 1988, c. L-12, s. 88; The Labour Relations Act, C.C.S.M. 1987, c. L-10, ss. 12-13; Labour Act, R.S.P.E.I. 1988, c. L-1, s. 9(5)). Elsewhere, provisions against unfair labour practices have the same effect (see section 94(3)(a)(vi) of the Canada Labour Code). In General Aviation Services Ltd. (1982), 51 di 71; [1982] 3 Can LRBR 47; and 82 CLLC 16,177 (CLRB no. 385), the Board held that the refusal to take back strikers after a dispute constituted an unfair labour practice.

It is in that sense that the original panel appears to have referred to the replacement workers as "subordinate" to the striking employees, since their entitlement to continued employment following the strike may appropriately be described as subordinate to that of returning strikers.

Conversely, the temporary status of replacement workers has been confirmed by the Board in CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151):

"... As replacements, they occupy temporary positions pending the return of those whom they are replacing. ..."

(pages 406; and 280)

This view was reiterated in General Aviation Services Ltd., supra:

"On the other hand the status of those persons hired during a work stoppage is very tenuous to say the least. Their only protection are the existing legislated minimums such as minimum wage regulations. Unless the work stoppage extends over a one-year period they do not even qualify for the 'just cause' dismissal recourses under Part III of the Code. Regardless what an employer may promise such persons, they are only filling a temporary void and their existence is subject to the nature and outcome of the dispute. To say that they are employees in the bargaining unit represented by the very trade union that is involved in the dispute stretches the imagination to the very borders of the ridiculous."

(pages 84; 58; and 743-744; emphasis added)

As already mentioned, replacement workers as such are not excluded from the definition of "employee" under section 3(1) of the Code. The inclusion of replacement workers in a bargaining unit involved in a dispute is not automatic; it rests on the exercise of the discretion conferred on the Board by section 28(b). Parliament has opted for the Board to determine the issue under its general authority to define appropriate units; or, pursuant to section 16(p)(i) of the Code, the Board may decide whether a person is an employee and, under section 16(p)(v), determine whether a group of employees is a unit appropriate for collective bargaining.

Such a discretion must be exercised in accordance with the Code's objectives, one of which is "the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes."

The Board recognizes that replacement workers are "employees" within the meaning of the Code, albeit temporary employees. As such, they are free to join a trade union of their choice according to section 8(1) of the Code and section 2(d) of the Canadian Charter of Rights and Freedoms. However, being employees does not necessarily mean that they should be included in a bargaining unit involved in a labour dispute. Moreover, employees' basic freedom of association is not infringed, whether they be replacement workers or not, by a decision to exclude them from, or for that matter, to include them in a bargaining unit (Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; and RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460).

Traditionally, the following criteria guide the determination of units appropriate for collective bargaining: duties and qualifications of employees; history of collective bargaining between the employer and the union representing the employees; viability of the unit; existence of community of interest; interchangeability between employees; industrial peace (Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRBR no. 675); and Sicard Inc., [1965] R.D.T. 353). This list is not exhaustive and none of these criteria is determinative. Yet the common thread of these criteria is that the unit they are aimed at helping to define must be appropriate for a very specific purpose:

viable collective bargaining. This purpose, like that of the duty to bargain in good faith (section 50(a)) remains unaltered when a dispute breaks out (Maritime Employers' Association (1986), 68 di 48 (CLRB no. 602); and General Aviation Services Ltd., supra).

When considering the inclusion of replacement workers in the unit, the "community of interest" criterion is one of major importance. Labour Boards have long held that replacement workers do not share any community of interest with the permanent workforce.

In Arthur T. Ecclestone, supra, while the Board dismissed an application for revocation on other grounds, it nonetheless commented thus:

"... We do wish to say that it is our initial conclusion that the divergent economic interests recognized by Bastin, J. in Re Brandon Packers Limited, supra, and fleshed out by Professor Arthurs lead us to favour a decision in which only those who were employed on the day of the commencement of the strike and still have an interest in the issue should decide the representational question. We do not consider that accepting employment elsewhere, no matter how temporary or permanent, is determinative of the question whether there is a continuing interest for an individual. Parliament has not placed a time limit on legitimate economic conflict and we are well aware of disputes that resulted in collective agreements several years after their commencement. ..."

(pages 626; 314; and 514; emphasis added)

In Manitoba, the Court of Queen's Bench expressed its views on the issue in Re Brandon Packers Limited (1960-61), 33 W.W.R. 58 (Man. Q.B.) following an application to set aside a decision of the Labour Board. There, during a lawful strike, the employer had filed an application for decertification after firing employees and hiring replacement workers. The Manitoba Labour Board had ordered a vote, proposing to poll separately the remaining

strikers and the replacement employees. Although the Court reversed the Board's decision on the ground that it simply did not have the power to order the vote, the Court said:

"... It seems clear that it is for the board to decide what group of employees at any given moment is a unit appropriate for collective bargaining. The words 'appropriate for collective bargaining' embody the idea of a group of employees having common economic interests so that it is just and equitable that they should be represented by one bargaining agent. It must be assumed that immediately prior to the strike, Local 255 of United Packinghouse Workers of America represented the majority of the employees in the unit which had been designated as a unit appropriate for collective bargaining. A strike is a means taken by employees to induce the employer to agree to their demands and if it is successful it must lead to further collective bargaining. It would appear to be consistent with the purpose of the Act that there should be continuity of representation during the negotiations following the calling of a strike. From the standpoint of their economic interests, the striking employees remain a group quite distinct from workmen who have been hired to replace them. In my opinion the board has a duty to recognize this fact by treating the strikers as a unit appropriate for collective bargaining. The board would therefore only consider revoking the certification of the bargaining agent of the strikers if it formed the opinion that it no longer represented a majority of the striking employees. In forming this opinion it would not be influenced by the views of workmen who had been hired to replace the strikers. If it had the power to take a vote, the board should have confined the vote to the striking employees."

(page 63; emphasis added)

The Alberta Labour Relations Board made similar comments with respect to replacement workers in Zeidler Forest Industries Ltd., [1993] Alta. L.R.B.R. 3:

"... The Employer's ongoing obligation to bargain in good faith with the Union leaves the potential for their displacement. Their original hiring was temporary and remains so. As such, they are in a conflict position, and do not share a community of interest with the balance of the workforce. They truly remain replacement employees, excluded from the unit for the reasons given in cases such as Brandon Packers, CJMS and Adams Laboratories."

(page 27; emphasis added)

In Bird Machine Co. of Canada (1990), 10 CLRBR (2d) 251, the union asked the Saskatchewan Labour Relations Board to order the employer to deduct and remit union dues for replacement workers employed during a strike. Ultimately, the Board had to decide if replacement employees belonged to the union's bargaining unit. After concluding that the bargaining unit becomes fixed at the commencement of the strike, the Board stated:

"... The employer then has the right to employ management personnel and replacement workers for the purpose of doing the work of the bargaining unit. However, those non-union replacement workers do not become members of the bargaining unit any more than management personnel who are also replacing striking employees."

(pages 259-260; emphasis added)

This Board is also of the view that replacement workers and the permanent workforce of an employer involved in a dispute have fundamental conflicting interests which warrant the exclusion of replacement workers from any bargaining unit involved in a dispute.

Replacement workers are always used to counteract the pressure exerted by a strike or increase the pressure exerted by a lockout. Their use in such circumstances cannot be isolated from the ultimate purpose of such measures which, in our free collective bargaining system, is to bring about a constructive settlement to a dispute between an employer and a union. Thus, the interests of the replacement workers are not only divergent from, but squarely opposed to those of the permanent workforce.

While it is correct to say that a bargaining unit changes with the workforce, its growth is suspended while there is an ongoing labour dispute. Replacement workers are not to be equated with incumbents of the positions included in

the bargaining unit. Replacements, like management personnel, only perform the functions of the permanent incumbents until the dispute is settled. On reflection, this finding also stems from the fact that there cannot be two employees in the same bargaining unit position. Strikers remain incumbents of the positions until they resign from their employment, are laid-off or dismissed for just cause (Nolisair International Inc. (Nationair Canada) (1992), 93 CLLC 16,018 (CLRB no. 980).

These policy arguments and considerations find support in the statutory language of the Code.

Under the Code, it can be argued that a bargaining unit is "fixed" by sections 24(3) and 38(5) during a strike or lockout. These sections provide:

*"24.(3) An application for certification under subsection (2) in respect of a unit shall not, except with the consent of the Board, be made during the first six months of a **strike or lockout of employees in the unit** that is not prohibited by this Part.*

...

*38.(5) An application under subsection (1) or (3) shall not, except with the consent of the Board, be made in respect of the bargaining agent for **employees in a bargaining unit** during the first six months of a **strike or lockout of those employees** that is not prohibited by this Part."*

First, these provisions prevent any certification or revocation applications from being made during the first six months after the commencement of the dispute. After that period, "employees in the unit," i.e. the unit involved in the negotiations, may make an application for revocation or a trade union may apply for certification for that unit pursuant to section 24(3).

When read in context, the unit referred to in these sections can only be made up of those employees in the unit at the commencement of the strike or lockout. Consequently, the number of employees included in the unit during a strike or lockout may decrease but cannot increase. Thus, in the case of a raid or a revocation, the unit will remain fixed until the settlement of the dispute. Those hired during the dispute will remain outside the unit until the parties negotiate an agreement as to the status of the employees hired after the commencement of the strike or lockout. In cases where revocation is granted, the issue will be for management to resolve because there will be no further union involvement.

The fact that replacement workers hired during a strike or a lockout are excluded is not unique. For example, in a case involving individuals replacing employees on maternity leave, the employees on leave were found to remain the real incumbents of their positions and their replacements to be only temporary, performing their functions until the others returned. In Canadian Imperial Bank of Commerce (Alness Branch, Downsview) (1978), 28 di 921; [1978] 2 Can LRBR 361; and 78 CLLC 16,145 (CLRB no. 141), the Board concluded:

"We therefore conclude that both Mrs. Ritacca and Mrs. Cianfrini, while being on maternity leave, were employees of the employer's Alness Branch, and as such were entitled to vote and direct that their vote should be counted.

As to Mrs. Mione and Mrs. Dzikowski, their votes should not be counted as at the date of the vote they were merely temporary employees replacing Mrs. Ritacca and Mrs. Cianfrini, and as such, they did not have a community of interest with the employees of the Alness Branch."

(pages 929-930; 368; and 538)

The Code is aimed at promoting sound labour relations through meaningful collective bargaining. This Board, after due consideration of all the submissions received and review of all options, concludes that, as a matter of policy aimed at achieving sound labour relations in the federal jurisdiction, it would be contrary to our Canadian scheme of free collective bargaining to include in the bargaining unit involved in a dispute employees whose basic interests lie in the continuation of the dispute.

**B: Replacement Workers' Role
 vis-à-vis the Selection
 of the Bargaining Agent**

Even if the Board had concluded that replacement workers were employees in the bargaining unit, they would not be eligible to participate in the selection of a bargaining agent for the unit on strike for the following reasons.

First, the Board notes that Parliament chose to ignore the issue of the eligibility of replacement workers in the selection of a bargaining agent, contrary to recommendation 466(3) of the Woods Report (Canadian Industrial Relations: The Report of Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968)). According to that recommendation, no employee hired during a lawful strike would have been considered with respect to the issue of union support until a year after the commencement of the strike. What Parliament did instead was to impose a time bar on the filing of applications for certification or decertification during a lawful strike. As already mentioned, sections 24(3) and 38(5) of the Code provide that no certification or revocation applications can be filed during the first six months after the commencement of a strike or lockout. Parliament did not pursue the idea of a general rule with respect to the

issue of eligibility. Rather, it left it to the Board to determine who would be entitled to participate in the selection of a bargaining agent, pursuant to sections 28(c) and 30(1)(a) of the Code and in light of the overall scheme of the Act. These provisions read as follows:

"28. Where the Board

(a) has received from a trade union an application for certification as the bargaining agent for a unit,

(b) has determined the unit that constitutes a unit appropriate for collective bargaining, and

(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

...

30.(1) Where the Board orders that a representation vote be taken among employees in a unit, the Board shall

(a) determine the employees that are eligible to vote; ..."

(emphasis added)

From that angle, the eligibility of replacement workers has implications in many circumstances: certification of a raiding union (as in this case); revocation of bargaining rights, (section 38) and final offer vote (new section 108.1 of the Code, S.C. 1993, c. 42, in force since June 23, 1993).

Employee support in favour of a bargaining agent is determined, depending on the circumstances, either through membership cards or through a representation vote (Hudson Bay Mining and Smelting Co., Limited (1993), 93 CLLC 16,023 (CLRB no. 999); Canadian Broadcasting Corporation (1993), as yet unreported CLRB decision no. 1004; and Canada Post Corporation (1990), 80 di 209 (CLRB no. 798)).

Section 28(c) of the Code provides that the Board must be satisfied that the majority of employees in the unit wish to be represented by the applicant trade union in order to certify it as a bargaining agent. The Board will first evaluate the evidence of majority support by examining the membership cards pursuant to sections 23 and 24 of the Board's Regulations (Radio CHNC Limitée (1983), 63 di 26; 86 CLLC 16,009; 12 CLRBR (NS) 112; affirmed (1986), 79 N.R. 81; 87 CLLC 14,048 (F.C.A.)). However, in some circumstances, the Board will also order a vote pursuant to section 29(1) of the Code in order to be satisfied, under section 28(c), that the applicant union has the support of the majority (Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186, at page 193; 18 CLRBR (NS) 233, at pages 240-241; and 87 CLLC 16,034, at page 14,270 (CLRB no. 640)).

Section 29(1) of the Code reads:

"29.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."

In raid situations, the Board will often order a vote even where the raiding union has shown majority support at the time of filing its application for certification (CJMS Radio Montréal (Québec) Limitée, *supra*). In such a case, section 30(1) of the Code provides that the Board shall determine which employees will be eligible to vote. What this means is that there is no such thing as an automatic right to vote. That right has to be put into context.

Membership cards and votes are two different and complementary means to achieve the same result: to satisfy the Board on the issue of employee support.

From this standpoint, the Board considers that the constituency normally called upon to select a bargaining agent through a vote should be the same one which is considered by way of membership cards. It would not make sense, from a labour relations perspective, to consider certain employees' membership cards and to not allow them to vote or vice versa.

For reasons quite similar to those warranting the exclusion of the replacement workers from the unit, the Board finds that even if their positions were found to belong to the unit, the Board would not have entitled the replacement workers to participate in the determination of union support. It is the Board's finding that when a strike or lockout is in effect, eligibility to select a bargaining agent should be limited to persons employed on the day prior to the commencement of the dispute. This policy, we find, is determined under the Board's authority to decide the date as of which union support should be established, pursuant to section 28(c) in cases of certification and section 17 in cases of revocation or final offer vote.

"17. Where the Board is required, in connection with any application made under this Part, to determine the wishes of the majority of the employees in a unit, it shall determine those wishes as of the date of the filing of the application or as of such other date as the Board considers appropriate."

The full Board adopts the position first stated in Arthur T. Ecclestone, *supra*, and recently reiterated in Nolisair International Inc. (Nationair Canada), *supra*:

"Since these legislative rules are in place and since the interpretation given to them is accepted, answering the question of which employees are eligible to select a bargaining agent, where an application for certification is filed during a strike or lockout,

necessarily involves identifying the employees who are affected by the dispute leading to the declaration of a lockout and who have an interest in the outcome. In the present case, the settlement should produce a collective agreement and lead to a return to work, thereby bringing an end to the collective bargaining begun in November 1990.

In the Board's opinion, these employees are the ones who bargained unsuccessfully with the employer, through their certified bargaining agent, during the bargaining process which has yet to be completed. They are the ones who, at one point, refused to accept the employer's bargaining proposals. This refusal led the employer to use, when it deemed appropriate, a means to compel them to agree to terms or conditions of employment, in the hope that this form of pressure would persuade them to enter into a collective agreement on its terms. In short, they are the ones who belonged to the bargaining unit on November 19, 1991, who were affected by the collective bargaining then in progress and who have an interest in the outcome.

...

To give another interpretation of the notion of employee for the purpose of determining the representative character of a trade union during raiding in the course of a strike or lockout would negate the process of union representation by condoning interference in the expression of the wishes of the employees concerned. It would also compromise the fulfilment of the objectives of the collective bargaining system established by the Code and, at the same time, the objective of industrial peace."

(pages 14,132-14,133; emphasis added)

The British Columbia and Ontario Labour Relations Boards follow a similar policy. Influenced by the criteria stated by the Board in 1978 in Arthur T. Ecclestone, supra, the B.C. Board includes in the selection of a bargaining agent only employees employed on the date of the commencement of the strike who may be regarded as having a continuing interest in the outcome of the dispute. (Muckamuck Restaurant Ltd., [1979] 3 Can LRBR 301 (B.C.), at page 303; Adams Laboratories Ltd. et al., [1980] 2 Can LRBR 101 (B.C.), at page 103; Employees of T.A. Steadman Marketing Consultants et al. (1985), 85 CLLC

16,030 (BCLRB), at page 14,208). We agree with that policy.

In Ontario, prior to the recent legislation banning the use of outside replacement workers, the OLRB examined the question of employee eligibility in the context of a final offer vote. The date usually chosen by the Ontario Labour Board to determine eligibility to vote is the date the vote is ordered. However, when a strike or lockout is ongoing at the time a final offer vote is ordered, the Board has decided to amend its rule:

"... The rule usually applied by the Board to determine voter eligibility is that all persons employed in the voting constituency (in this case, in the bargaining unit) on the date to vote is ordered (or on the terminal date, in the case of a pre-hearing representation vote), are eligible to vote. If no strike or lock-out is ongoing at the time that a section 40 vote is requested, directed and conducted, it seems likely that that rule would be equally useful in resolving any voter eligibility questions which might arise. However, we are not satisfied that the rule is equally applicable where, as in this case, there is an ongoing strike or lock-out. In a strike or lock-out situation there may be no employees at work when such a vote is requested, directed or conducted and there may therefor be no employees at work in the bargaining unit. Or, because an employer is entitled to try to carry on its business during a strike or lock-out (and because strikes sometimes receive less than complete support from employees), issues may arise as to whether persons who work during a strike or lock-out are entitled to work, particularly if they are 'replacement workers' in the sense that they were not employed prior to the strike or lock-out. Although voter eligibility was not an issue there, the Board touched on this potential problem in Canada Cement Lafarge Ltd., [1980] OLRB Rep. Nov. 1583 ('Canada Cement I') at paragraph 9:

'9. A similar but much more difficult situation may arise where the outcome of the vote has been clearly influenced by the segregated ballots cast by a large number of strike replacement employees. If the vast majority of the employees in the bargaining unit who are employed at the commencement of the strike have, however, voted to reject the last offer and to continue their strike, it would be counter-intuitive, in an industrial relations sense, to conclude that the trade union is automatically bound by the wishes of employees it does not really represent.

Indeed, the employer's offer in such circumstances might even contain terms which are very damaging to the trade union as an entity, i.e. See Wilson Automotive (Belleville) Ltd., [1980] OLRB Rep. July 1136 where an employer's offer contained a demand that the trade union compensate it for losses sustained during a strike. ...'

The potentially thorny issue of replacement workers did not arise in this case. Having regard to the evidence before the Board, and the manner in which the parties approached the issue of voter eligibility, we determined that it was appropriate to limit the eligibility to vote to persons who were employees in the bargaining unit at the time the strike began. ..."

(Wilf McIntyre, [1990] OLRB Rep. Oct. 1052, pages 1063-1064; emphasis added)

The Board is aware that a somewhat different approach was applied in CJMS Radio Montréal (Québec) Limitée, supra. In that decision, the Board had classified replacement employees in order to determine their eligibility to select a bargaining agent:

"If we apply the obiter in the CKLW decision,

(1) those employees who were employed by CJMS when the strike was called on January 26, 1977 and who were not officially dismissed or did not officially resign, and

(2) those employees who were hired to replace those who had resigned or been dismissed are entitled to vote. It follows that those persons who were hired to replace the striking employees are not considered employees for the purpose of determining the majority status of the unit in question. As replacements, they occupy temporary positions pending the return of those whom they are replacing. They therefore have no possible community of interest with the incumbents of these positions."

(pages 406; and 280)

The Alberta Labour Relations Board followed that approach in the context of an application for revocation in Zeidler Forest Industries Ltd., supra. Following the principle that only employees who will be covered by a collective agreement should be entitled to vote, the Board concluded:

"Having considered all these cases and arguments, the Board has come to a conclusion about which employees are entitled to be polled

because they are in the bargaining unit. The bargaining unit is the unit for which the union is collectively bargaining. That means the persons who will be covered by a collective agreement if and when one is successfully concluded. It includes strikers returning upon a settlement and excludes only those who would be displaced."

(page 26; emphasis added)

After thoroughly considering the issue, the Board has decided to reject that approach for the following reasons. By definition, replacement workers are hired as a means to settle a labour dispute. Because of their role, we find that they should not, in any circumstance, be allowed to go as far as being able to undermine the representative character of a bargaining agent until the strike or lockout comes to an end. That possibility only rests with those who were there in the first place. The status of any replacement worker hired during a labour dispute remains temporary until the parties to the dispute decide otherwise. Whether hired as replacements for strikers, or for deceased or retired employees, replacement workers are hired to exert pressure in a collective bargaining context. For that reason, they will remain excluded in this jurisdiction from the constituency able to influence union support. Thus, the Board will not interfere in the free collective bargaining process. To decide otherwise would, in deference, likely cause the Board to get involved in bargaining issues that are better left to the parties (Zeidler Forest Industries Ltd., [1993] Alta. L.R.B.R. 138). At the end of the day the fate of replacement employees once the strike or lockout is over is a matter to be negotiated between the parties. This policy in the long run will, in our view, better promote the constructive settlement of disputes. A strike or a lockout is a means of achieving a collective agreement, not a battle over union recognition.

Finally, as discussed by the Ontario Board in Wilf McIntyre, supra, the temporary status of replacement workers' entitlement to vote is further evidenced in the case of a final vote offer. The Code's provision on final offer votes, calls for everyone in the unit, and therefore not only in the union (as is usually the case) to vote on an employer offer. That section reads:

"108.1(1) Where notice to bargain collectively has been given under this Part, and the Minister is of the opinion that it is in the public interest that the employees in the affected bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, the Minister may

(a) on such terms and conditions as the Minister considers appropriate, direct that a vote of the employees in the bargaining unit to accept or reject the offer be held as soon as possible; and

(b) designate the Board, or any other person or body, to be in charge of conducting that vote."

(emphasis added)

This section must be read in conjunction with sections 24(3) and 38(5) which notionally fix the bargaining unit as that which exists at the commencement of a strike. It would make no labour relations sense to allow replacement workers to take part in a vote aimed at bringing to an end a dispute that got them a job. The final offer vote is clearly aimed at encouraging the settlement of disputes. To allow replacement workers to vote would, without a doubt, negate this objective because of their obvious vital interest in the prolongation of the dispute. The Board adopts the Ontario Labour Relations Board's view that replacement workers should not be entitled to vote on an employer's last offer. The mechanics of that provision, recently introduced, further evidence the counter-productive consequences of allowing replacement

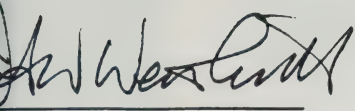
workers to be part of a bargaining unit involved in a dispute.

For all these reasons, the Board concludes that only the persons who were employees in the bargaining unit at the time of the commencement of the strike or lockout are eligible to participate in the selection of the bargaining agent.

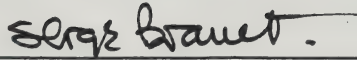
In the instant case, the file shows that the Giant Mines Employees Association does not have majority support in the unit determined to be appropriate. Accordingly, the full Board, notwithstanding the original panel's upcoming finding on the issue of employer domination, maintains the decision to dismiss their application for certification in File 555-3528.

This is a unanimous decision of the full Board.

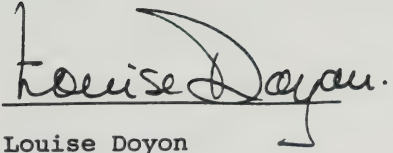
ISSUED at Ottawa, this 31st day of August 1993.



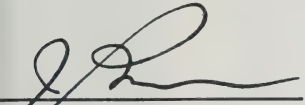
J.F.W. Weatherill
Chairman



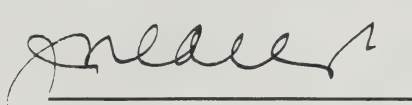
Serge Brault
Vice-Chair



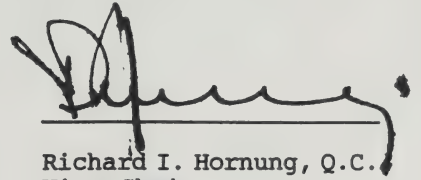
Louise Doyon
Vice-Chair



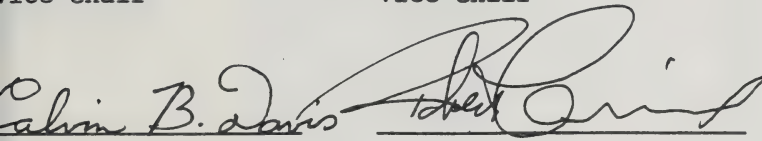
J. Philippe Morneau
Vice-Chair



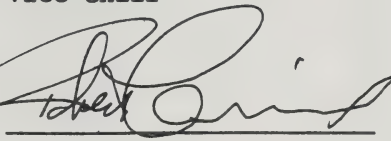
Jean L. Guilbeault, Q.C.
Vice-Chair



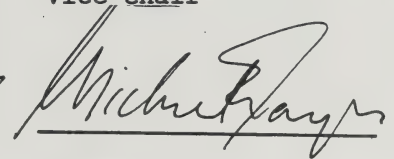
Richard I. Hornung, Q.C.
Vice-Chair



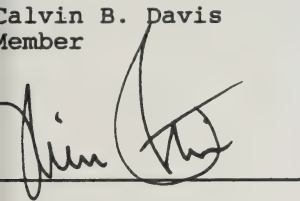
Calvin B. Davis
Member



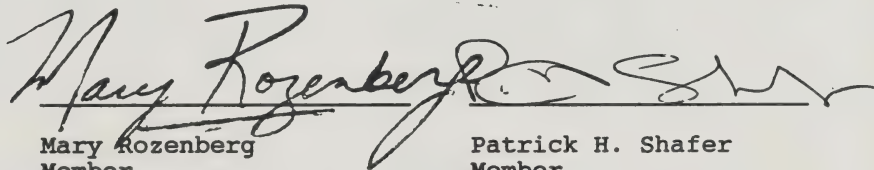
Robert Cadieux
Member



Michael Eayrs
Member

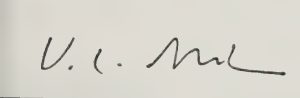


François Bastien
Member

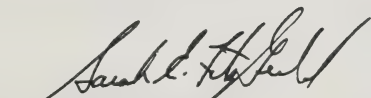


Mary Rozenberg
Member

Patrick H. Shafer
Member



Véronique L. Marleau
Member



Sarah FitzGerald
Member

CAI
L100
-ISA

Information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Summary

Résumé

Paul Dickinson, complainant, International Longshoremen's and Warehousemen's Union, Local 500, respondent, and B.C. Maritime Employers Association, employer.

Paul Dickinson, plaignant, Syndicat international des débardeurs et magasiniers, section locale 500, intimé, et B.C. Maritime Employers Association, employeur.

Board file: 745-4222
Decision no.: 1029

Dossier du Conseil: 745-4222
Décision n° 1029

The complainant, Paul Dickinson, member of the union, owed monies to his union, i.e. a fine of \$581.00 and dues. Consequently, he was suspended from the union and his work plate was removed from the hiring hall, therefore depriving him of the opportunity to work as a longshoreman.

Le plaignant, Paul Dickinson, membre du syndicat, devait de l'argent à son syndicat, soit une amende de 581,00 \$ et des cotisations. Par conséquent, il a été suspendu du syndicat, et sa fiche de travail a été retirée du bureau d'embauchage. Il a donc raté des occasions de travailler comme débardeur.

Mr. Dickinson filed a complaint against his union, alleging that it had violated the Code on three occasions, under sections 69(3), 95(f), (g) and (e).

M. Dickinson a déposé une plainte alléguant que son syndicat avait à trois reprises enfreint des dispositions du Code (par. 69(3) ainsi que al. 95f), g) et e)).

With respect to section 69(3), the union has made reasonable efforts to publish its rules and the Board sees no reason to address that issue.

En ce qui a trait au paragraphe 69(3), le syndicat a fait des efforts raisonnables pour publier ses règles, et le Conseil estime qu'il n'y a pas lieu d'examiner cette question.

Sections 95(f) and (g) prohibit the discriminatory application of membership rules and of standards of discipline of a trade union. The right of the union to discipline its members has been upheld under the specific circumstances of this case.

Les alinéas 95f) et g) interdisent l'application discriminatoire de règles d'adhésion et de normes de discipline d'un syndicat. Le droit que détient un syndicat d'imposer des mesures disciplinaires à ses membres a été confirmé dans les circonstances particulières de la présente affaire.

Section 95(e) deals with termination of employment. In this case, the Board sees no reason to determine that an employee is terminated by his employer within the scope of section 95(e) when the union removes his work plate from a hiring hall.

L'alinéa 95e) porte sur la cessation d'emploi. Dans la présente affaire, le Conseil estime qu'il n'y a pas lieu de statuer qu'un employeur a congédié un employé aux termes de l'alinéa 95e), lorsque le syndicat retire une fiche de travail d'un bureau d'embauchage.



nada
bour
lations
ard
nseil
nadien des
lations du
avail

Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Paul Dickinson,

complainant

International Longshoremen's and
Warehousemen's Union, Local 500,

respondent

B.C. Maritime Employers
Association,

Employer

Board File: 745-4222

The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chair, Messrs.
Calvin B. Davis and Michael Eayrs, Members.

A hearing was held in this matter in Vancouver on March 24 and 25, 1993.

Appearances

Mr. Paul Dickinson, on his own behalf ; and

Ms. Leah Terai, Counsel, assisted by Mr. Tom Dufresne, President, ILWU -
Local 500 for the respondent.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-
Chair.

Paul Kenneth James Dickinson is a longstanding member of the International
Longshoremen's and Warehousemen's Union - local 500, Vancouver
(hereinafter called the union).

On April 22, 1992, Mr. Dickinson filed a complaint with the Board alleging
that his union, the International Longshoremen and Warehousemen's Union
Local 500 had violated Sections 69(3), 95(e), 95(f) and 95(g) of the Canada
Labour Code, Part I - Industrial Relations.

When Mr. Dickinson filed his complaint on April 24, 1992, he had not yet been suspended from his employment. When, as a result of other incidents, he did lose the opportunity to work, he so informed the Board. Attempts by the Board's officers to mediate the complaint were unsuccessful, and the Board therefore set the matter down for a hearing.

Mr. Dickinson has worked on the waterfront of the Vancouver Harbour for over 15 years. His services are hired out to various employers who are members of the British Columbia Maritime Employers Association.

Mr. Dickinson is governed by the constitution of the union that signed a collective agreement with the Association.

The Association hires its employees through a dispatch system operated from a hiring hall. The rules that govern the dispatch system include the "preferential employment of Union Members" "dispatched on a fair and equitable basis".

Each member has a "work plate" bearing his name and uses this work plate to make himself available for a designated shift, selected from a posted work sheet. The member may or may not be dispatched for work on the chosen shift. If not, he then makes another selection for a later shift.

On December 8, 1991, Mr. Dickinson had worked the graveyard shift (from 1:00 a.m. to 8:00 a.m.) on a first aid job.

At around 3:30 that afternoon, he went to the hiring hall to select another graveyard shift from the posted worksheet for the next day. The dispatcher, an employee of the Association that runs the hiring hall, asked Mr. Dickinson if he wanted to work as a bulk operator on the night shift of that same day. Usually, a business agent is present at this time in case there is any dispute regarding the dispatch. However, on this particular day, there did not appear

to be one around for Mr. Dickinson to consult on whether or not he should accept the 2nd shift within a 24 hour period. He decided to make himself available, and accepted the dispatch.

Mr. Dickinson therefore worked two shifts within the same calendar day (December 8, 1991). This is what the union calls "double shifting". The Board did not find in the constitution a written definition of double shifting, but there is a definition in Section 21.05 of the Collective Agreement and a reference to double shifting is made in the minutes of the Union's Special Membership & Grievance Committee Meeting held on June 3, 1991. The item entitled "Revised Penalties (Fines and Time Off)" contains at clause 4, the following reference:

"double shifting"

- 1st offence: \$100.00 plus both shifts' pay,
- 2nd offence: conduct detrimental.

On December 31, 1991, the Secretary Treasurer of the local charged Mr. Dickinson with double shifting and requested that he appear before the Membership and Grievance (M & G) Committee of the Local. This particular committee was created by the local in accordance with its constitution and by-laws (article VI). It is the committee that normally decides whether or not there has been a violation of any union rules. This committee also sets down the appropriate penalties.

On January 13, 1992, Mr. Dickinson was advised to appear before the Committee on January 28, 1992 to answer the charge of double shifting. However, on January 27th, Mr. Dickinson wrote to the committee that he was unable to attend their meeting the next day due to the illness of one of his children. In his letter, he gave his version of the events. The letter reads as

follows:

"From Paul Dickinson

January 27/92

To M & G Committee

Unfortunately I cannot attend tomorrow's meeting of 10:00 a.m.. I have a sick child at home that has to be cared for.

I worked as a first aid attendant on the 1:00 a.m. shift Dec. 8/91.

I went to the hall about 3:20, to make myself available for the graveyard shift, in my category (warehouse board).

As I was looking at the graveyard work sheet, one of the dispatchers asked me if I was plugging in for 5 p.m..

I said no as I had worked the 1:00 a.m. that day. He told me "I could plug in and let the button go by". He further told me that they were going to be short bulk operators and that he would appreciate me being available.

I was not completely sure of this procedure but as no business agent was in sight and given the immediacy of the moment, I accepted the dispatchers' statement and plugged in.

I will finish with the following statements:

- a) I am not a high wage laborer and have no desire to double shift or gain shifts that I am not entitled to.*
- b) At no time during the day of Dec. 8, did I knowingly or willing break a dispatch ruling known to myself.*
- c) I have never taken a shift out of the proper order before and obviously will not allow this situation to occur again.*
- d) Had there been time, I would have checked out the dispatcher's statement. I believe he either misunderstood me, or quite frankly, I was duped by him.*

Yours fraternally

Paul Dickinson 16371;"

On January 29th, the M. & G. Committee advised Mr. Dickinson that he had been found in violation of the rules concerning double shifting and that he would be fined \$581.00. This was the amount of money Dickinson made in both his shifts, plus \$100.00.

On February 8, 1992, Mr. Dickinson wrote the union requesting an appeal of the M. & G. Committee's decision. On February 24, he appeared at the union hall at the requested hour of 6:30 pm to appeal the decision of the M. & G. Committee to the executive of the Local. He was not called immediately to appear before the executive. After approximately 45 minutes, he left to attend to other obligations. Around 7:45, the executive called for him and since he was not present, his appeal was tabled until the end of the meeting, at which time the appeal was lifted from the table and filed.

The next day, Mr. Dickinson wrote to the union seeking to appeal the decision of the M. & G. Committee to the general membership. On March 25, the local union President informed him that because his case had not been dealt with by the executive there was no avenue of appeal to the General Membership.

A further letter from Mr. Dickinson to the union demanding the charges and fine be dropped on the grounds he was denied his right of appeal, was rejected by the union. The union wrote to Mr. Dickinson to request payment of the outstanding fines. In his reply, Mr. Dickinson advised he would pay the fines for the union meetings he had missed but not the fine of \$581.00. He also reminded the union of certain provisions of the Canada Labour Code.

The union requested once more that Mr. Dickinson appear before the executive committee to have his appeal heard. The union even reversed its earlier decision not to allow the matter to proceed to a meeting of the General Membership. Mr. Dickinson was informed that he could now, if he so chose, appear at the General Membership Meeting and put his appeal before the membership. Mr. Dickinson declined the union's offers to have his appeal heard at a subsequent meeting of the executive or the general meeting.

On August 21, Mr. Dickinson was advised by the union that it would no longer accept payments on his behalf through payroll deductions.

Mr. Dickinson would be required to settle all indebtedness in person. The paymaster of the British Columbia Maritime Employers Association (BCMEA) was also advised by the union that forthwith, the dues were not to be checked off Mr. Dickinson's pay cheque. Mr. Dickinson never authorized the union or the BCMEA to stop the deduction of union dues from his pay cheque.

As the dues were no longer being deducted, he soon fell in arrears. On November 4, the union advised him in writing to bring his dues into good standing or risk being suspended from all work under the jurisdiction of the local.

A few days later, through his lawyer, Mr. Dickinson sent a cheque to the union for three months' dues. The union returned the cheque as it clearly indicated it was for payment of dues only. Article VII, Section 3 of the Local constitution dictates that fines are payable before dues. As Mr. Dickinson had an outstanding fine, the union was only prepared to accept payment of the fine before accepting payment of dues.

Finally, on December 14, 1992, Mr. Dickinson was suspended from all further work under the collective agreement for non-payment of money owing to the union. The work plate in the name of Paul Dickinson (16371) was removed from the hiring hall. The suspension from union membership and the removal of the work plate resulted in a denial of work opportunity.

The Board notes that the union did not contest the status of "Employee" of the

complainant and consequently, the Board finds that Dickinson is a person protected by Section 95 (e), (f) and (g).

The Board notes that the union did not contest its jurisdiction in this matter and this subject was not discussed in any way. This being said, the Board finds that it has the necessary jurisdiction to hear this case, based on the decisions rendered in Terry Matus (1980), 37 di 73; [1980] 2 Can LRBR 21; and 80 CLLC 16,022 (CLRB no. 211) and Gerald Abbott (1977), 26 di 543; [1978] 1 Can LRBR 305; and 78 CLLC 16,127 (CLRB no. 114).

Alleged Violation of Section 69(3)

Section 69 of the Code reads as follows:

69.(1) In this section, "referral" includes assignment, designation, dispatching, scheduling and selection.

(2) Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall establish rules for the purpose of making such referrals and apply those rules fairly and without discrimination.

(3) Rules applied by a trade union pursuant to subsection (2) shall be kept posted in a conspicuous place in every area of premises occupied by the trade union in which persons seeking referral normally gather.

At the time this complaint was filed on April 24, 1992, the union admits that the dispatch rules were not posted in the Hiring Hall. There were difficulties in having the dispatch rules posted. The British Columbia Maritime Employers Association operates the hall and thus controls what is posted. Also, when the union was able to post the rules, it was not long before they were torn down.

Since April 1992, the union has undertaken to review and update its dispatch rules. Arrangements have been made to post them at the dispatch hall, along

with the policy concerning casuals. Also now posted is the schedule of penalties. These rules are posted inside a glass enclosed bulletin board with sliding glass doors.

There is no doubt that, at the time of the complaint, the rules were not posted. However, as the union has no control over the hiring hall, it is questionable whether they could be at fault for not keeping the rules posted. In any case, the Board notes that the rules are now posted in a conspicuous place in the hall, where they can be perused by all. The Board's normal remedy is to order that the rules be posted. As this has already been done, there is no longer any need for the Board to make a determination on that issue.

Alleged Violation of 95 (f) and (g):

Section 95 (f) and (g) reads as follows:

"95. No trade union or person acting on behalf of a trade union shall

...

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;"

The Board, in Paul Horlsey et al. (1991), 84 di 201; and 15 CLRBR (2d) 141 (CLRB no. 861), reviewed and outlined the approach it uses when determining whether there has been a violation of Section 95(f) and/or (g):

«Obviously, sections 95 (f) and (g) are directed at internal affairs of trade unions and in recognition of a reluctance to interfere in internal union matters, Parliament provided an opportunity for union members and trade unions to resolve this type of dispute through unions' internal appeal processes. To

this end, section 97 (4) prohibits complaints alleging violations of these sections of the Code from being brought to the Board until internal appeal procedures have been exhausted:

'97.(4) Subject to subsection (5), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant first presented his grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.'

Exceptions are contained in subsection (5) of 97:

'97. 5) The Board may, on application to it by a complainant, hear a complaint in respect of an alleged failure by a trade union to comply with paragraph 95(f) or (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure.'

It was conceded by the parties to these complaints that the internal appeal processes in CUPW's constitution have been exhausted, therefore, section 97(4) is not a bar to the Board dealing with them; however, we thought that it would be helpful to refer to these provisions to capture the full intent of the legislation. Clearly the mischief sought to be caught by these sections is discriminatory abuse of internal disciplinary powers. The Board is not to sit in appeal from decisions made by trade union disciplinary bodies. This was made clear by the Board in Ronald Wheadon et al. (1983), 54 di 134; 5 CLRB (NS) 192; and 84 CLLC 16,004 (CLRB n°. 445) where the Board expressed

its view of what its role is in this type of complaint and set out what it expected from trade unions that were responding to complaints under these sections of the Code from their members:

'It should be made very clear that this Board is not an appeal body from internal union discipline. The role of the Board under section 185 (g) (now section 95 (g)) of the Code is to ensure that discipline standards, which includes the basis for their application, the manner in which they have been applied and the results of their application, are free from discriminatory practices. In performing that task the Board that would negate the informality provided for in the constitutions of some trade unions. What the Board does expect though, are realistic, human and plausible explanations from trade unions for their conduct.'

(page 150; 209; and 14,036-14,037; emphasis added)

In the same decision, the Board also reviewed the standards it would be applying when dealing with complaints under section 95(f) and (g). For our purposes here, it is only necessary to zero in on what is meant by «discriminatory» in the context of these sections:

'...this Board endorses the criteria set down by Mr. Innis Christie, then Chairman of the Nova Scotia Labour Relations Board, when he said in Daniel Joseph McCarthy and International Brotherhood of Electrical Workers [1978] 2 Can LRBR 105, at p. 108:

In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act S.N.S. 1969, c.11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made.'

(pages 146; 205; and 14,034; emphasis added)

In Fred J. Solly (1981), 43 di 29; [1981] 2 CAN LRBR 245; and 81 CLLC 16,089 (CLRB no. 296), the Board also had the following to say about administering and interpreting the two sections:

"In administering and interpreting section 185(f) and (g) (now sections 95(f) and (g) the Board must start from some basic premises. First, the sections are intended to protect and advance individual rights against the previously unfettered authority of the union organization. Second, they do not abolish the right of the union to expel, suspend or discipline members or deny membership to non-members."

(pages 44; 256; and 565 emphasis added)

The Board is thus seeking to determine whether or not the standards of discipline were applied to Mr. Dickinson in a discriminatory manner. Was Mr. Dickinson the subject of discrimination when he was found to have violated the union's rules, in the imposition of and, amount of the penalty?

The Board does not see anything in the union's actions which would lead it to believe that Mr. Dickinson was discriminated against. Mr. Dickinson was given ample opportunity by the union to appear before the M. & G. Committee and defend himself. When he chose not to appear and was fined in absentia, the union gave him every opportunity to appeal his fine. Mr. Dickinson chose not to do so. He makes much of the fact no dispatch rules were posted at the time he accepted the double shift. While this is so, there is no doubt that Mr. Dickinson was aware that double shifting was contrary to the union rules. He had worked in the longshoring industry for some 15 years and before becoming a union member, attended an orientation meeting where the union explained that a person could only have 1 dispatch per day. It was also explained that any violation of the dispatch rules would result in charges.

The Board also heard evidence from Mr. Dickinson's own witnesses as well as the unions that it was common knowledge on the waterfront that double-shifting was not allowed. It would be virtually impossible for Mr. Dickinson not to know of the double-shifting rule.

There was also uncontradicted evidence of witnesses from both sides that the

established fine for double shifting was two shifts plus \$100.00. This was exactly what Mr. Dickinson was fined.

Mr. Dickinson's actions were not those of an individual who was seriously intent on putting up a defense against the penalties he faced, either before the trial committee or the appeal committee. He did not bother attending any of the meetings that the union subsequently asked him to attend to review his case. He cannot now come to the Board claiming discrimination when of his own accord he chose not to appear at the M. & G. Committee or at any of the subsequent meetings the unions invited him to attend.

Although the Board has determined that the complaint was filed on time in accordance with section 97(4)c), it seriously doubts that Mr. Dickinson complied with the other provisions of the Code that require union members and trade unions to resolve their disputes through the union's internal appeal processes. Mr. Dickinson certainly didn't display any effort to avail himself of the opportunity to take advantage of the appeal system.

The section 95(f) and (g) complaints are dismissed, since the union has not conducted itself in a manner contrary to the Code.

Alleged violation of 95 (e)

Section 95.(e) reads as follows:

"95. No trade union or person acting on behalf of a trade union shall

...

(e) require an employer to terminate the employment of an employee because the employee has been expelled or suspended from membership in the trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union

as a condition of acquiring or retaining membership in the trade union;"

The union asked the employer to cease the payroll deduction of Mr. Dickinson's union dues and the employer complied with this request. The union then refused to accept direct payment of union dues by Mr. Dickinson because of a provision in the union's constitution which stipulates that:

"All fines, assessments and other indebtedness shall be payable before dues".

Mr. Dickinson was therefore unable to work until he paid his fine.

The union at no time required the employer to terminate Mr. Dickinson. Indeed, the removal of a "work plate" from a hiring hall suspends only temporarily the opportunity for an employee to work.

The Board has made it quite clear in past decisions that it will not interfere with a union's right to discipline its members. It is also not within the Board's role to interpret or second-guess the provisions of a union's bylaws or constitution. In Canadian Association of Trades and Technicians v. Canada (Treasury Board) (F.C.A.) [1992] F.C.J. No. 159, the Court had the following to say about involvement by the Public Service Staff Relations Board into the constitution of a union:

"In order to decide if an organization is a viable union, therefore, the Board is not entitled to examine in minute detail each of the provisions of the constitution and pass judgement on their democratic flavour. These matters of detail are for the unions and their members to decide, not for the Board, unless it is given express statutory authority. The Board must limit itself to deciding if the organization has a written constitution, duly adopted by the members, which allows it to operate as a viable

entity and to legally bind the organization and its members. (See Capital Coach Lines & CBRT et al. [1980] 2 Can. L.R.B. 407, at p. 410)."

(page 154)

The Court then went on further to say:

"The criticism expressed by the Board as to the quality of the democracy established in the constitution was not within its jurisdiction. Certainly there were gaps in the constitution which it would be desirable to fill. Certainly, there were matters which it might be better to eliminate. But it is not the business of the Board to impose a more democratic constitution on the union; that is the responsibility of the union and its members. In seeking to impose those preferable provisions, the Board erred in law and exceeded its jurisdiction."

(page 154)

Unions have the right to discipline their members. This is essential if they are to become and remain viable. Indeed, the Code contemplates that unions are going to discipline their members. What the Code seeks to do is ensure that they are not disciplined in a manner that is discriminatory. Unions are allowed to design rules that will protect trade union principles as well as create protection for its members, so long as they do not do so in a discriminatory fashion. The I.L.W.U. membership created certain work rules that it felt would ensure that every member was given as equal an opportunity as possible to the available work. If these rules are to the dislike of some members of the union then it is up to them to change them internally. Mr. Dickinson, when joining the union, agreed to abide by its constitution and by-laws including that section in the by-laws that says fines are payable before dues. In Gerald Abbott, supra, it was one of the first opportunities for the Board to consider extensively the prohibitions in Section 185.(e), (f) and (g) of the Code. The panel dismissed the complaint under Section 185.(e) (now 95.(e)) and had the following to say:

"Although Abbott was removed from the priority list at the instance of the union we have no evidence he sought to assert a right to employment and that the union interfered contrary to section 185.(e). Consequently, there is no need for us to determine if the union had any right to require his termination because of his failure to pay the fine. Nor need we determine whether the fine was an assessment 'uniformly required to be paid by all members'. Abbott's case was not seriously advanced as a violation of section 185(e).»

(pages 562; 315; and 387)

Although the particular panel in Gerald Abbott, supra did not have to address the issue of 95(e), Mr. Dickinson's allegations are such that the matter now has to be addressed.

When Mr. Dickinson's membership was suspended by the union, this did not amount to a termination of employment as contemplated by 95 (e) of the Code. Mr. Dickinson was able to continue working so long as he paid his fine. The Board will only intervene when the union's conduct has the effect of imposing permanent termination of employment. This was what happened in Gerald Abbott, supra. In Mr. Dickinson's case, this was never the intention of the union. The union was simply concerned with collecting a fine that had been imposed for disciplinary reasons. Where the union's conduct is not discriminatory and does not result in a termination of the employment relationship, it cannot be said that the provisions of the Code have been violated. Mr. Dickinson could simply have paid his fine and returned to work without missing a shift. Section 95(e) is not intended to be used by a union member as a bar to paying a fine properly assessed by a union for disciplinary purposes. If the member feels the fine is discriminatory then he has ample protection under sections 95(f) and (g) of the Code. As stated previously, we have found nothing in the union's conduct which is contrary to those two sections of the Code.

The complaint under 95 (e) is therefore also dismissed.

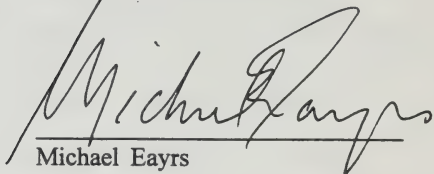
This is a unanimous decision of the Board.



Jean L. Guilbeault, Q.C.
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

ISSUED at Ottawa this 9th day of September, 1993

information

This is not an official document. Only the Reasons for decision can be used for legal purposes.

Summary

Ed Koski and Dave Boose, complainants, and Canadian Pacific Limited, employer.

Board File: 950-201

Decision no. 1030

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Ed Koski et Dave Boose, plaignants, et Canadien Pacifique Limitée, employeur.

Dossier du Conseil: 950-201

Décision n° 1030

Reference of decisions of a safety officer under section 129(5) of the Canada Labour Code, Part II, in which the safety officer had concluded that the situation investigated did not constitute a danger within the meaning of the Code.

The Board held that no acute or immediate danger existed at the time the applicants invoked their refusal to work pursuant to section 128 of the Code.

Consequently, the Board confirmed the safety officer's decisions.

Renvoi en vertu du paragraphe 129(5) du Code canadien du travail, Partie II, de décisions d'un agent de sécurité qui avait conclu que les conditions de travail des plaignants ne présentaient aucun danger au sens du Code.

Le Conseil a statué qu'il n'existait aucun danger grave ou immédiat au moment où les plaignants ont exercé leur refus de travailler en vertu de l'article 128 du Code.

Par conséquent, le Conseil a confirmé les décisions de l'agent de sécurité.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnements et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Ed Koski and Dave Boose,
applicants,
and
Canadian Pacific Limited,
employer.
and
Labour Canada,
interested party.
Board File: 950-201

The Board was comprised of Mr. Michael Eayrs, Member, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. Louis Gottheil, assisted by Mr. Bob Chernecki, Director, Health and Safety Department, CAW-Canada, and Ms. Kit Galvin, Occupational Hygienist, MFL Occupational Health Centre, for the applicants; and
Ms. Marie Senécal-Tremblay, assisted by Ms. Barbara Mittleman, Director, Employee Relations, CP Rail, for the employer.

The Board's hearing in this matter was held at Calgary on November 6 and 7, 1991 and January 15, 16, 17 and 18, 1992. It concluded with written submissions filed by the parties in February 1992.

These are two referrals of a safety officer's decision at the request of Ed Koski and Dave Boose, employees of Canadian Pacific Limited (CP Rail). The referrals were made pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health). Section 129(5) reads as follows:

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

I

During these proceedings the Board dealt with two matters which may be characterized as procedural in nature and were disposed of as follows.

1. In reviewing the correspondence dated June 24, 1991 from CAW-Canada to CP Rail (referred to later in these reasons) the Board noticed the following paragraph:

"it appears this letter is more geared toward the Company position before the Labour Relations Board than it is for the formation of a System Health and Safety Committee."

The parties (CAW-Canada and CP Rail) were informed that I was presently engaged in section 18 proceedings involving, among others, CAW-Canada and CP Rail and were asked to advise me if this raised any concerns with respect to my carriage of the instant case. Both parties advised me that no such concerns existed and that they wished me to continue.

2. In response to an objection by CP Rail and Labour Canada to the stated intention by CAW-Canada to introduce the issue of the alleged presence of cadmium and lead in the context of the operations which were the subject of the safety officer's investigation and decisions presently

before it, the Board ruled to the effect that while it would permit the introduction of any material which might be considered useful as background information, it would, at the end of the day, concern itself with a determination of whether or not the decisions of the safety officer were correct in the context of the circumstances before him at the time of his investigation and decisions.

II

The background against which the work refusals took place may be summarized as follows.

In April 1991, CP Rail was advised by Canadian National Railway Company (CN Rail) of PCB contamination of painted surfaces on certain locomotives and rail cars. CP Rail conducted preliminary testing and, based on the results, a general information bulletin (Bulletin no. 21) dated May 21, 1991 was issued and posted through the CP Rail system (including the Golden shop). That bulletin, addressed to all supervisors and employees reads as follows:

"GOLDEN B.C., May 21, 1991

BULLETIN NO. 21

TO: ALL EMPLOYEES & SUPERVISORS GOLDEN CAR SHOP

SUBJECT: PCB Contamination of Locomotive and Car Painted surfaces

GENERAL INFORMATION BULLETIN

BACKGROUND

We have recently been made aware of PCB contamination of painted surfaces of locomotives at CN Rail. An investigation conducted at their Technical Research Centre indicated PCB levels above 50 ppm. Concentration over 50 ppm are designated as hazardous. The source of PCBs may have originated as an anti-corrosive oil film application on steel at the point of manufacture and the paint absorbed the PCBs over time. Paint layers closest to the metal (oldest layers of paint) have shown the highest

level of PCBs. The equipment which may be contaminated was built prior to 1971 after which the use of PCBs in oil as a rust inhibitor became restricted. The freight cars tested by CN Rail have tested negative for PCBs. However the testing of cars to date has not been as extensive as on locomotives.

The health risk to employees from exposure to the PCBs in the workplace would primarily be due to heating of the contaminated surface between 200-700 deg. C., e.g. cutting, welding and burning activities. The gaseous dioxins and furans generated as a result of such heating are considered very hazardous.

CN Rail employees and regulatory bodies - Labour Canada and Environment Canada - are also aware of the problem. They have accepted the precautionary measures that have been put into effect to minimize the PCB exposure risk to employees.

CP RAIL - PLAN OF ACTION

Following the findings at CN, we are embarking upon a rational program of testing of PCB levels of paint samples of locomotives and cars.

However until the results become available and the extent of the problem with CP Rail equipment is determined, following actions must be followed:

'Steps must be taken to protect the health of employees in work situations when cutting, welding or burning painted surfaces of locomotives and cars built prior to 1971. These procedures would require employees to (a) utilize a source capture smoke/fume removal system (b) avoid direct fume inhalation (c) minimize exposure to heating of the painted surfaces where applicable e.g. wire brush or grind surfaces prior to cutting, welding or burning of the steel plate.'

We will keep you advised of further developments as they unfold.

Chief Mechanical Officer

Manager, Operations Mechanical"

As further background, it may be noted that CP Rail did, in fact, commence a comprehensive program of paint sampling and analysis throughout its fleet and placed priority on rail cars built in 1971 or earlier. CP Rail also engaged a toxicologist, expert in the field of PCBs, dioxins and furans, as an advisor on this matter. Meetings were held at various locations with employees,

local health and safety committees and regional Labour Canada representatives. Officials of Labour Canada were actively involved in the process of evaluation of the problem and development of recommendations for interim protective measures and longer-term solutions. Attempts were made by CP Rail and Labour Canada to involve CAW-Canada and other shopcraft unions in the development, at the national level, of a fully co-ordinated approach to dealing with the potential risks involved. CAW-Canada declined participation, at the national level, with the other shopcraft unions and put forward its own positions with respect to the manner in which the matter should, in its opinion, be handled.

III

Messrs. Koski and Boose are both experienced carmen working at CP Rail's car repair shop located at Golden, B.C. (the Golden Shop). On June 27, 1991, both invoked their rights pursuant to section 128 of the Code to refuse certain work, namely work involving cutting, gouging, burning or welding (hot work) in connection with the repair of railway cars. Both reported their refusals to Jim Woodrow, CP Rail mechanical operations manager, and Tom Muir, Co-Chair of the Golden CAW-Canada Health and Safety Committee. Incidentally, Mr. Koski is Chair of the CAW-Canada and CP bargaining unit at Golden, and Mr. Boose is the Alternate Member of the local health and safety committee.

It should also be noted that the day prior to the refusals, Messrs. Koski and Boose had returned to Golden from a CAW-Canada skilled trades conference at which safety concerns with respect to the performance of hot work on certain cars had been discussed and that, at or

about the time of the refusal, Mr. Woodrow was presented with a copy of a lengthy letter dated June 24, 1991 from CAW-Canada to CP Rail expressing the union's position concerning a number of matters in connection with the possible contamination due to the existence of polychlorinated biphenyls (PCBs) in paint or protective coatings on certain CP Rail locomotives and cars throughout the entire CP Rail system. It became apparent during the hearing that Messrs. Koski and Boose clearly intended to invoke their right to refuse hot work as a means to precipitate further investigation and actions related to the entire "PCB problem" as it might affect carmen in general. By stating this, I imply no criticism of their actions. They clearly had, pursuant to the Code, the right to refuse work they had reasonable cause to believe was "dangerous" to themselves and their fellow workers.

Section 128(1) of the Code reads as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

IV

When the refusals occurred, Mr. Woodrow contacted Joseph Paches, Labour Affairs Officer, Labour Canada (a safety officer within the meaning of the Code), who is based at Kelowna, B.C., and advised him of the situation. Mr. Paches discussed the matter on the telephone with

Messrs. Koski, Boose and Woodrow, and was advised that hot work on cars had been suspended and would be resumed on a voluntary basis only. He was also advised that paint testing would be expedited. Mr. Paches indicated that the PCB problem was being dealt with at a national level; he requested that the refusals be sent to him in writing and advised that he would await results of the paint testing prior to making his investigation and issuing a decision.

The refusals were put in written form and sent by fax the same day to Mr. Paches.

The two written refusals, with minor differences in wording, are substantially identical. To quote that signed by Mr. Koski:

"Please accept this as my right to refuse unsafe work at Golden car facility as there is no real proof that the level of PCBs in the cars we work on are acceptable or for that matter what they are. Our shop does not have as defined 'local ventilation'."

On June 28, 1991, sampling equipment arrived and CP Rail, with the full involvement and co-operation of Messrs. Boose, Koski and Muir proceeded to take paint samples from 20 cars built prior to 1971 and 20 cars built after that date. The samples were delivered to a laboratory in Edmonton for analysis of PCB content. The results were received on June 30 and that same day Messrs. Woodrow and Boose cosigned and posted a handwritten notice which reads as follows:

*"Instructions --
Cars built 1971 or newer - no special
protection required.*

Resp (sic) and precipitators recommended.

*Cars built prior to 1971 - must use respirators
and precipitators - as one car tested at 88 ppm
hot work on these cars will be discretionary*

until further advised."

Following June 30 and consultation with the local health and safety committee, another 13 samples were taken from rail cars in the group of cars suspected of having PCB-contaminated surfaces.

On July 2, a further notice was signed by Mr. Woodrow and posted. It reads as follows:

"GOLDEN, B.C., July 2, 1991

BULLETIN NO. 031

TO: ALL EMPLOYEES & SUPERVISORS - GOLDEN CAR SHOP

SUBJECT: PCB Painted Surfaces - Update

The following instructions apply to all employees engaged in cutting, welding, grinding, etc.

Cars built 1971 and newer

No special respiratory protection required.
Employees are encouraged to use respirators and smoke precipitator.

Cars built prior to 1971

Employees must use organic vapor respirator and smoke precipitator while engaged in hot work on these cars.

The above mentioned instructions apply until further information and test results become available.

Please be governed accordingly.

S.J. Woodrow
Manager, Operations Mechanical
SJW/sv

c.c. D.R. Boose
E.J. Koski
T.J. Muir"

On July 8, 1991, Mr. Paches conducted his investigation at the Golden shop and on July 16 he forwarded his decisions

to Messrs. Koski and Boose. Those decisions are identical in wording and are those referred to the Board in the instant proceedings. The decision sent to Mr. Koski is quoted below in full (without the attached test results referred to in the decision). Also quoted is the opinion of K.R. Schrag of Labour Canada, which was requested by Mr. Paches in the course of his investigation and which was forwarded with his decision.

"#301, 478 Bernard Avenue
Kelowna, B.C. V1Y 6N7
Telephone: 861-6043

July 16, 1991

File: 896-15-3/1

Mr. Ed Koski
Box 2348
Golden, B.C.
VOA 1H0

Dear Mr. Koski:

Subject: Refusal to Work on June 27, 1991

On June 27, 1991, in accordance with Sections 128 and 129 of the Canada Labour Code, Part II, both you and Mr. Dave Boose facsimilied your right to refuse to work by reason of danger.

Following an investigation, it is this Officer's decision that the situation does not constitute a danger as defined in Part II of the Canada Labour Code.

Please find attached the details of the investigation conducted in this matter and the ensuing decision.

I trust everything is to your satisfaction.

Yours truly,

(signed)

Joseph Paches
Labour Affairs Officer

JP/gg

c.c. Mr. S.J. Woodrow, Mgr. Ope.
Mechanical, CP Rail
Mr. Tom Muir, Co-chairman, Safety & Health
Committee

Parties involved

Ed Koski
Carman
Local Chairman of CAW

Complainant

Dave Boose Complainant
Carman
Alternate member of
Safety & Health Committee

Tom Muir Employees' representative
Carman
Member of Safety & Health
Committee

S.J. (Jim) Woodrow Employer's representative
Mgr. Oper. Mechanical

Chris Mastrobuono Employer's representative
Supervisor of Training

Bob Finnie Employer's representative
Shop Industrial Engineer

Grant Atchkins Contractor
Maintenance Foreman

Roy Mitchell Accident Prevention Co-ordinator

PREAMBLE

The safety officer intervened by meeting the parties at the Golden Shop on July 8, 1991, pursuant to the authority invested in him under subsections 129.(1) and 129.(2) of the Canada Labour Code, Part II.

REASONS FOR REFUSAL

The complainants feel that the work procedures established to protect them against the decomposition products of PCBs and the PCBs themselves are inadequate. They also believe that they have not been sufficiently informed and that all of their questions have not been answered.

They feel that the situation constitutes a danger and they invoke the protection of the Code.

DESCRIPTION OF THE FACTS

- The employer recently learned that the paint covering some of the mobile equipment was contaminated with PCBs.

- The employer is currently assessing the risks to which employees may be subjected who are involved in operations that could result in the emission of PCBs and their decomposition products (dioxins and furans).

- The employer requested that Labour Canada express an opinion as to the interim measures that would be sufficient to protect workers pending the results of the risk assessment.

- The interim measures are as follows: 'In welding, grinding, cutting and burning operations where the average concentration level of PCBs is below 50 p.p.m. workers must

be protected by using a respirator with a filter for organic vapor and a local ventilation system.

For concentration levels above 50 p.p.m., an air line respirator is to be used...'

JOBS PERFORMED BY THE EMPLOYEES

The two complainants are carmen involved in welding, grinding, cutting and burning operations.

They are concerned about the health risks of being exposed to PCBs and to its decomposition products.

They want assurance that the equipment supplied especially the masks and the local exhaust system will offer adequate protection.

POSITION OF THE EMPLOYER'S REPRESENTATIVE

Mr. Jim Woodrow has stated the following:

- on June 27, 1991, when Messrs. Boose and Koski exercised the right to refuse, he assigned them other duties and stopped welding operations involving cars which suspected PCBs.
- Chris Mastrobuono and Dave Boose took twenty samples, by way of approved written procedures. Samples were taken of 10 cars built prior to 1971, and 10 built 1971 and newer.
- samples were sent to the Enviro Lab, 9936 - 67th Avenue, Edmonton, Alberta on June 29 and the results were received on June 30, 1991. Copies of results attached.
- upon receipt of results an instruction was posted, signed by S.J. Woodrow and D. Boose. A copy of their instruction is attached.
- on July 2, 1991 another Bulletin was posted signed by S.J. Woodrow. A copy attached.
- on July 8, 1991, 13 more samples were taken on cars built prior to 1971. Results attached.

INVESTIGATION

The on site investigation was done on July 8, 1991 at the C.P. Rail Car Shop in Golden, B.C.

I met with all the parties involved except Dave Boose, and listened to their views. Dave Boose was on annual leave.

We discussed the sampling procedures and went over the sampling results.

With the exception of three cars, the tests revealed no PCBs present. Of the three cars, #349325 and #349251 indicated a trace of PCBs. Car #349540 indicated 88 p.p.m. All three were built prior to 1971.

It was confirmed at the meeting that as a result of the tests and the June 30 Instruction and July 2, 1991 Bulletin, welding operations could continue. However, any employee could refuse to work on any car until the investigation was finalized.

Ed Koski continued his refusal stating that his main concern was now over their smoke precipitators.

I took technical data on their precipitator type dust collectors, and observed its operation. I took photos and discussed maintenance procedures with Bob Finnie and Grant Atchkins. The following day this material was sent in to K.R. Schrag, M.Sc.P.Eng., Industrial Hygiene and Safety Engineer, Labour Canada.

On July 8, 1991, I also inspected sampling equipment, respirators, and observed the procedure of taking samples. The welding on cars, not suspected of containing PCBs, was also being done during my visit.

I was also advised that 13 additional samples were being taken. Car #349540 which indicated 88 p.p.m. was again to be one of the 13 tested. Upon completion the results would be sent to me.

Throughout my investigation I observed that Mr. Jim Woodrow and the employees worked collectively on this concern. All were involved and information obtained was available to everybody.

It should also be mentioned that Mr. Ken Schrag and myself attended the CP Rail's Revelstoke Safety and Health meeting on June 11 and Golden's on June 12, 1991. Also a special meeting was requested and held with Ed Koski, Dave Boose, Tom Muir, Jim Woodrow, Chris Mastrobuono, Bob Hopper and Roy Mitchell at the Golden Car Shop on June 12, 1991. At all these meetings, Ken Schrag talked, discussed and answered questions on the PCB concern which was going on at the time with C.N. Rail and CP Rail across Canada.

On July 11, 1991, I was sent K.R. Schrag's comments on Potential Exposure to PCBs and Decomposition Products during Welding at CP Rail, Golden Shops. Attached are his comments.

On July 15, 1991, I had a telephone conversation with Dave Boose. He advised that upon completion of the sampling taking and test results he spoke with Ed Koski. He said that as far as the sampling, he was satisfied with the procedures and testing done but was still concerned. When asked what was his major concern, he too stated the precipitators. I informed him of Mr. Schrag's opinion.

DECISION

Based on my investigation and the fact that:

- the analysis results were representative and with the exception of two cars, one testing at 88 p.p.m. in one section and 80 p.p.m. in another section, and another car at 31 p.p.m., the rest indicated PCB concentration levels of either a trace or none;

- the precipitator type dust collectors being employed are satisfactory;

- the employer applied the necessary protective measures;

- the general lack of information about PCBs was not liable to change the risks associated with the decomposition of the PCBs on that 27th of June 1991;

I hereby conclude that there is no danger to the workers.

(signed)

J. Paches
Safety Officer

Encl.

c.c. S.J. (Jim) Woodrow, Mgr. Oper. Mechanical
Tom Muir, Co-chairman, Safety &
Health Co-ordinator
Roy Mitchell, Accident Prevention Co-
ordinator

(emphasis added)

"To: J. Paches
Labour Affairs Officer
Pacific District
Kelowna, B.C.

From: K.R. Schrag
Industrial Hygiene and
Safety Engineer
Vancouver, B.C.

July 11, 1991

Subject: POTENTIAL EXPOSURE TO PCBs AND
DECOMPOSITION PRODUCTS DURING WELDING AT CP
RAIL, GOLDEN SHOPS

Further to our discussion on Tuesday July 09, 1991 I have reviewed the material you forwarded concerning the concentration found, the sampling procedure and the precipitator type dust collector being employed to capture the welding fume. I have also discussed the situation with Mr. A. Pighin, Director Technical Services.

We are in agreement that the dust collectors in use at the CP Golden Shops, if properly used, and maintained in accordance with the manufacturer's instructions, will not discharge hazardous concentrations of PCBs or their decomposition products into the shop atmosphere.

The technical literature that TSD have reviewed shows that the PCBs and their decomposition products are strongly attracted to particulate material, particularly freshly formed fume such as is generated by welding processes, thus if the exposure to welding fume is controlled then the potential exposure to PCBs etc is also controlled. The dust collectors at the Golden Shops also include a charcoal filter. This is further assurance that any organics present will also be collected.

As requested I am returning the material you forwarded for my review.

I trust the above will be of assistance to your reply concerning the refusal to work.

(signed)
K.R. Schrag

cc M. Thomas
J. Sullivan"

VI

At its hearing, the Board received evidence from nine persons, several of whom provided information and opinion based on their professional and technical expertise and knowledge of various aspects of the matter.

It is not necessary for purposes of these reasons to go into detail with respect to the substantial amount of evidence received. The pertinent information can be summarized as follows.

The Golden Shop is a modern facility opened in 1987. Its primary function is the planned maintenance of a fleet of over 2700 coal cars and a smaller fleet of about 200 covered hopper cars. At the time of the refusals about 75 to 80 carmen were employed at the facility, all or most of whom would have been engaged in performing hot work as required in connection with repairs to the cars. It was estimated that perhaps 10 to 20 hours of hot work per week might be required of a carman so engaged and that of the

entire fleet perhaps 20 to 25% of the cars were in the group suspected of having some surfaces containing PCB-contaminated paint.

The hot work is performed at times in relatively confined spaces "curtained off" (a normal welding procedure) to protect others from the intense light (welding flash) generated during the procedure. In addition to the normal protective equipment (welding helmet, gloves, etc.) used in work of this type, there were dust precipitators and half-face respirators available to those performing the work. These are the two items of protective equipment referred to in the safety officer's decision and about which there were different opinions expressed at the hearing.

The dust precipitators are mobile units which have been at the Golden Shop since its opening. Each has a large diameter flexible tube attached. It is operated by placing the tube opening as close as possible to the hot work to capture the welding fume which is then passed through an internal electronic and charcoal filtering system and discharged vertically into the upper spaces of the shop from which it can be discharged out of the shop by the shop's ventilation system. It was this precipitator that Mr. Schrag of Labour Canada (in response to the safety officer's request) commented upon favourably (see pages 13 and 14 of these reasons). His views were supported, at the hearing, by a technical expert engaged by CP Rail. Mr. Koski, on the other hand, supported by the written views of a number of carmen, took the position that the type of precipitator in use was difficult to position properly and not sufficiently effective in fume extraction at the work site and expulsion of fumes from the work area and shop.

The half-face respirators in use at the time were also the subject of different opinions. These were organic filter masks, manufactured by American Optical recently made available to carmen for use while performing hot work at Golden. These particular respirators, while not completely conforming with the standards of the National Institute of Occupational Safety and Health (NIOSH) for organic filter masks with an assigned protection factor of 10 were, in the opinion of some of the experts at the hearing, adequate for use in the particular circumstances in that they came within a few percentage points of the efficiency rating for similar masks carrying NIOSH approval. This was in conflict with the opinion of CAW-Canada's expert witness who basically supported the position that no respirator other than a supplied air respirator would provide adequate protection in the circumstances.

There was also a substantial amount of evidence and differences of opinion about the statistical analyses from which the standard of allowable amounts of PCB concentration on the surfaces subject to hot work, namely up to 50 parts per million (ppm) vs. more than 50 ppm had been developed. These standards dictated the required protective measures to be applied.

Most importantly, there was no evidence with respect to any report by Messrs. Koski or Boose or other employees of CP Rail of the types of physical manifestations which could result from prolonged, excessive exposure to contaminants released during hot work involving PCB-contaminated surfaces.

After hearing a great deal of technical evidence and opinion and receiving and reviewing substantial written material (of which the foregoing is only a cursory summary) I do not believe it helpful or necessary to go into greater technical detail for purposes of these reasons and therefore reach the following conclusions with respect to the evidence adduced.

There is no question that PCBs, when burned at certain temperatures, do release toxic substances which, if ingested in certain quantities over time may produce physical conditions dangerous to health.

At the time the safety officer conducted his investigation and rendered his decisions, CP Rail, Labour Canada, CAW-Canada and other unions were in the relatively early stages of attempting to deal with a potentially major safety problem which possibly affected the entire CP Rail system. Although certain preliminary standards and corresponding corrective measures were in place, there were continuing developments which might result in refinements and/or changes to both those standards and protective measures. The refusals giving rise to the safety officer's decisions, subsequent referrals and these proceedings, took place, in my opinion, in the context of what might be characterized as a chronic or systemic potential hazard as opposed to an acute or immediate hazardous condition.

The question thus squarely before me in the circumstances of the instant case is whether or not, at the time Messrs. Koski and Boose exercised their rights to refuse and at the time safety officer Paches conducted his investigation and rendered his decision, there existed at the Golden car shop a "danger" as defined thus by section

122(1) of the Code:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

CAW-Canada argues forcefully, in effect, that the circumstances in this case are precisely those contemplated by the Code in its provision of the right to refuse work embodied in section 128. The fact that Messrs. Koski and Boose (and other carmen) had been performing hot work for some years, the absence of precise knowledge of the potential hazards and the lack of protective measures more stringent than those in place at the time should, in its opinion, lead to a finding that danger did in fact exist, and a corresponding direction by the Board with respect to the proper protective measures should, in its opinion to, be imposed.

CP Rail, on the other hand, argues with equal force that the conditions at the Golden car shop at the time in question did not constitute a "danger" within the meaning of the Code, that the matter of the potential hazards from exposure to PCBs can and should be dealt with only through a sustained co-operative effort involving health and safety committees, Labour Canada, CP Rail and its unions, and that in all the circumstances of this case the decisions of the safety officer should be confirmed by the Board.

In the instant case, Messrs. Koski and Boose clearly invoked their rights of refusal in an attempt to "bring to a head" concerns which they had with respect to the existence of a potential danger to health and the interim protective measures in place at the time and thus obtain, through the vehicle of a safety officer's decision, a

satisfactory resolution to those concerns.

In this regard, the Board had this to say in Steven Brailsford (1992), 87 di 98 (CLRB no. 921):

"The right to refuse is an emergency measure to deal with dangerous situations that crop up unexpectedly and with those that require immediate attention and not as the primary vehicle for attaining the objectives of Part II of the Code or for settling long-standing disputes or differences. The safety provisions in the Code are intended to ensure that employers provide safe work places in terms of equipment and environment. The right to refuse is designed to be used in situations where employees are faced with immediate danger when injury is likely to occur right there and then if the danger is not removed. It is not meant to be used to bring ongoing disputes to a head and, where refusals coincide with other labour relations disputes, particular attention should be paid to the circumstances of the refusal. (See William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); Ernest L. LaBarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357); and Amber Hockin-Jefferson [(1990), 81 di 180 (CLRB no. 816)].)"

(page 110)

And in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686), the Board said:

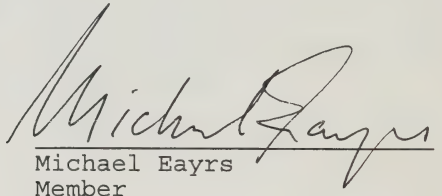
"... because a safety officer or the Board finds that there is no immediate danger to an employee and that the operation can resume, it does not mean that danger in the strict sense of the word does not exist at all. There may still be reason enough for the circumstances to be investigated further through the safety and health committees or representatives with a view to reducing the risk of injury or illness,... into the long-term effects of the hazard or condition that caused the employee's anxiety in the first place."

(pages 226; and 318)

With the greatest of respect to Messrs. Koski and Boose and CAW-Canada whose concerns for safety can, in one sense, only be viewed as commendable, I cannot conclude that work refusals pursuant to the Code provides them, in the circumstances of the instant case, with the

appropriate mechanism to attempt to reach their intended goals. The proper and feasible resolution of the type of safety concerns exemplified in this case is, in my opinion, embodied in the other provisions of Part II of the Code which encourage the use of joint co-operative efforts to resolve health and safety issues in the work place.

Following careful review of all the circumstances and evidence with respect to the instant case, I find that no danger, as defined in the Code, existed at the time of the safety officer's investigation and decisions. Accordingly, pursuant to section 130(1)(a) of the Code, the safety officer's decision is confirmed.


Michael Eayrs
Member

ISSUED at Ottawa, this 17th day of September 1993

CLRB/CCRT - 1030

CAI
L100
- IS2

Information

This is not an official document.
Only the Reasons for Decision can be
used for legal purposes.

Ce document n'est pas officiel.
Seuls les Motifs de décision peuvent
être utilisés à des fins juridiques.

Summary

Résumé de Décision

PORT OF CHURCHILL EXEMPT EMPLOYEES
ASSOCIATION, APPLICANT, AND CANADA
PORTS CORPORATION, CHURCHILL,
MANITOBA, EMPLOYER.

PORT OF CHURCHILL EXEMPT EMPLOYEES
ASSOCIATION, REQUÉRANTE, ET SOCIÉTÉ
CANADIENNE DES PORTS, CHURCHILL
(MANITOBA), EMPLOYEUR.

Board File: 555-3561

Dossier du Conseil: 555-3561

Decision No.: 1031

Décision n°: 1031

This is an application for
certification by the Port of
Churchill Exempt Employees
Association for a unit of supervisors
of Canada Ports Corporation, Port of
Churchill.

Il s'agit ici d'une demande
d'accréditation présentée par la Port
of Churchill Exempt Employees
Association à l'égard d'une unité de
surveillants de la Société canadienne
des ports, dans le port de Churchill.

The employer opposed the application
essentially on two grounds: that the
unit is inappropriate for collective
bargaining, and that the applicant is
not a trade union within the meaning
of the Code.

L'employeur s'oppose à la demande
pour les deux motifs suivants:
l'unité n'est pas habile à négocier
collectivement, et la requérante
n'est pas un syndicat au sens du
Code.

In its reasons the Board reviewed its
jurisprudence with respect to
supervisory units and the evidence
required with respect to the
determination of the status of a
trade union within the meaning of the
Code.

Dans ses motifs, il a passé en revue
sa jurisprudence portant sur les
unités composées de surveillants et
la preuve produite concernant la
détermination du statut de syndicat
au sens du Code.

The Board followed previous case law
in which it accepts a minimum of
formality when determining the
question of whether or not the
objectives of the union to regulate
the relations between employers and
employees has been established.

Le Conseil s'est inspiré de décisions
antérieures dans lesquelles il
accepte qu'un minimum de formalité
suffit pour déterminer si le syndicat
a pour objet de réglementer les
relations entre un employeur et les
employés.

The Board granted the certification.
The Board found the unit of
supervisory employees appropriate for
collective bargaining and was
satisfied that the applicant was a
trade union within the meaning of the
Code.

Le Conseil a accordé l'accréditation.
Le Conseil a jugé que l'unité
composée de surveillants est habile à
négocier collectivement et il est
convaincu que la requérante est un
syndicat au sens du Code.



Notifications of change of address (please indicate previous address) and other inquiries concerning subscriptions to the Reasons for decision should be referred to the Canada Communication Group - Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9.

Tel. no.: (819) 956-4802
FAX: (819) 994-1498

CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

Tout avis de changement d'adresse (veuillez indiquer votre adresse précédente) de même que les demandes de renseignements au sujet des abonnements aux motifs de décision doivent être adressés au Groupe Communication Canada - Édition, Approvisionnement et Services Canada, Ottawa (Canada) K1A 0S9.

No de tél.: (819) 956-4802
Télécopieur: (819) 994-1498

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Port of Churchill Exempt
Employees Association,

applicant,

and

Canada Ports Corporation,
Churchill, Manitoba,

employer.

Board File: 555-3561

The Board was composed of Mr. Richard I. Hornung, Q.C.,
Vice-Chairman, and Messrs. Calvin B. Davis and Patrick H.
Shafer, Members.

Appearances (on record):

Mr. Vinnay Verma, for the applicant.

Mr. Robert Monette, for the employer.

The reasons for this decision were written by Vice-
Chairman Richard I. Hornung, Q.C.

I

The Port of Churchill Exempt Employees Association (the
Association) brings an application, pursuant to section
24(2) (a) of the Canada Labour Code, for certification of a
group of supervisory employees at the Port of Churchill,
Manitoba.

Although the application does not set out the proposed
unit, its intent is to certify all supervisory and non-
unionized supervisory personnel at the Port of Churchill,
with the exception of the Operations Manager. The unit
sought essentially covers those employees whose work is of
a supervisory nature and who are excluded from a
certification order granted by this Board on October 5,

1959 (766-1034) and subsequently amended on August 14, 1970 (773-133) and April 19, 1988 (530-1565). The unit consisted of the following:

"employees of the National Harbours Board at Churchill, Man., employed in its main office, engineering department, elevator, commissary, powerhouse, machine shop, garage, and floating equipment at Churchill, Man., comprising salaried employees classified as chief clerk (grain), assistant chief grain clerk, timekeeper, assistant timekeeper, stores ledger keeper, assistant stores ledger keeper, stores checker, clerk (stores), instrumentman, junior instrumentman, rodman, receiving weighman, shipping weighman, millwright, electrician, assistant electrician, distributor (annex), distributor (cleaner), basement shipper, elevator watchman, cook-commissary, storekeeper helper, turbine operator, powerhouse fireman, gas mechanic and dragline operator, lake pumphouse pumpman, lake pumphouse fireman, marine engineer, deckhand, cook - 'Graham Bell', second cook, bullcook and cookee, and comprising prevailing rates employees classified as hoist runner, welder, blacksmith, pipefitter, carpenter, heavy equipment operator, tractor driver, fireman, fireman - 'Graham Bell', pumpman, elevatorman, labourer, general utilityman, rigger, and handyman, excluding the port manager, office supervisor and accountant, assistant accountant, stenographer, general foreman, elevator superintendent, elevator foreman, powerhouse superintendent, machine shop foreman, master and mate of the tug 'Graham Bell', master mechanic, maintenance supervisor, weighmaster, cleaner foreman, shipper foreman, trackshed foreman, house inspector, storekeeper, powerhouse engineer, building foreman and labour foreman."

II

The employer opposes the application essentially on two grounds:

1. That the unit proposed is inappropriate for the purposes of collective bargaining;
2. That the applicant is not a trade union and cannot therefore purport to seek bargaining rights.

III

In support of its first argument, the employer contends that the small number of positions in the proposed unit essentially constitute a "tag-end" group of employees that would be better served in the existing Public Service Alliance of Canada (PSAC) bargaining unit where their community of interest lies.

Section 27(5) of the Code provides as follows:

"27.(5) Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining."

Pursuant to section 27(5) of the Code, and the Board's jurisprudence on the issue, an employment attribute, such as the exercise of supervisory duties, does not automatically bar an employee from joining or forming a union for collective bargaining purposes. In an effort, however, to avoid conflicts of interest in such cases, the Board usually does not include supervisory personnel in the same unit as the employees they supervise: see Atomic Energy Canada Limited (1978), 33 di 415; and [1979] 1 Can LRBR 252 (CLRB no. 156), at pages 428; and 263-264; Island Telephone Company Limited (1990), 81 di 126 (CLRB no. 811), at page 131; and Canadian Broadcasting Corporation (1991), 84 di 1 (CLRB no. 846), at page 15.

Notwithstanding the applicant's failure to specifically delineate the unit sought, it is the obligation of the Board, pursuant to section 27(1) of the Code, to determine the unit that is appropriate for collective bargaining purposes.

In the present case, the members of the unit applied for exercise essentially supervisory duties over the employees who are members of the unit for which the PSAC is certified. Accordingly, they are better served in a separate unit which reflects their community of interest, thereby avoiding the degree of conflict which a single unit would pose. Placing the supervisory personnel in a separate unit will not, in our opinion, impair the employer's ability to operate efficiently.

It is our view, therefore, having regard to sections 27(1) and 27(5), that employees who perform supervisory duties at the Port of Churchill comprise an appropriate unit for collective bargaining purposes.

IV

The employer's second argument in opposition to the application is that the Association is not a trade union within the meaning of the Code and therefore cannot purport to seek bargaining rights. To support its claim, the employer contends, inter alia, that the Association's by-laws as drafted are invalid in that they are neither signed, nor properly identified.

In Reimer Express Lines Ltd. (1979), 38 di 213; and [1981] 1 Can LRBR 336 (CLRB no. 226), the Board held that an association was in fact a trade union under the Code, despite several deficiencies in the union's by-laws, and established the requirements that an association's constitution must meet:

"... the Board considers that the discrepancies in the method of the adoption of the association's constitution and the deficiencies

in certain provisions thereof are correctible and therefore should not be fatal to an application affecting the employees' rights under the Code. The intention was obviously to create an organization for the purpose of regulating relations between the employees and their employer. They succeeded, the association is a 'trade union' within the meaning of the Code."

(pages 224; and 345)

Further, in Capital Coach Lines Ltd. (Travelways) (1980), 40 di 5; [1980] 2 Can LRBR 407; and 80 CLLC 16,011 (CLRB no. 233), the Board stated:

"Labour boards have defined an organization of employees as one which must be formalized and regulated by some form of constitution in order that it be viable. ...

...

... The definition of section 107(1) still refers to 'organization of employees' and if such an organization is to exist, it must have minimum requirements, such as a constitution, to give it sufficient status to operate as a viable entity and to legally bind the organization and its members. The Board is not formalistic and it does not intend to deprive employees of the right to negotiate a collective agreement because of technical defects. Whenever possible, the Board will give the parties concerned the opportunity to correct any defects. This does not mean that there are no requirements at all. We believe that the strict minimum for an organization to be viable is that it is bound by a constitution."

(pages 8-9; 409-410; and 14,145-14,146)

Finally, in Canadian Assn. of Trades and Technicians v. Canada (Treasury Board), [1992] 2 F.C. 533; and (1992), 140 N.R. 151 (C.A.), Mr. Justice Linden of the Federal Court of Appeal observed:

"In order to decide if an organization is a viable union, therefore, the Board is not entitled to examine in minute detail each of the provisions of the constitution and pass judgement on their democratic flavour. These matters of detail are for the unions and their members to decide, not for the Board, unless it is given express statutory authority. The Board must limit itself to deciding if the

organization has a written constitution, duly adopted by the members, which allows it to operate as a viable entity and to legally bind the organization and its members. (See Capital Coach Lines Ltd. (Travelways) and Canadian Brotherhood of Railway, Transport and General Workers and Travelways Maple Leaf Garage Employees Association, [1980] 2 Can LRBR 407, at page 410)."

(pages 538; and 154)

In the instant case, the Association provided the Board with the minutes of its first meeting which are duly signed by the president and the secretary. It also provided the Board with a copy of its constitution which encompasses by-laws dealing, inter alia, with the aims and objectives of the union, its membership, the form of the organization, membership dues, the nomination and election of officers, finances and discipline.

These documents satisfy the requirements set forth by the jurisprudence of the Board and of the Federal Court, and we accordingly conclude that the applicant is therefore a viable union within the meaning of the Canada Labour Code.

In addition, the employer submits that, leaving the viability of the Association aside, by-laws 2 and 3 of its constitution which deal with "objectives and membership" do not contemplate collective bargaining and, therefore, it cannot seek bargaining rights as a "trade union" as defined by the Canada Labour Code. The Code defines "trade union" as follows

"'trade union' means any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees."

In the past, the Board has accepted a minimum of formality when determining the question as to whether or not the

objectives of the union "to regulate the relations between employers and employees" has been established. In Bank of Nova Scotia (1985), 62 di 190 (CLRB no. 533), the Board stated:

"... Section 107 does not provide that an organization must be capable of regulating relations between employers and employees. It simply states that that must be one of its purposes. It is for that reason that up to the present this Board, as well as others, have only required the minimum formality in determining trade union status. That statement was made by this Board in Bank of Nova Scotia (1977), 21 di 439; [1977] 2 Can LRBR 126, and 77 CLLC 16,090 (CLRB no. 91):

'Under the Code a trade union merely has to be an organization, one of the purposes of which is the regulation of relations between employers and employees. ...'

(pages 445; 131; and 529)"

(page 201)

In the present case, section 2 of the Association's by-law no. 2, sets forth the following objectives:

"To support fully the P.C.E.E.A. in the furtherance of its responsibility to obtain for all P.C.E.E.A. employees the best standard of compensation and other conditions of employment and to protect the rights and interests of all employees."

The phrase "to obtain for all P.C.E.E.A. employees the best standard of compensation and other conditions of employment and to protect the rights and interests of all employees" clearly illustrates the Association's objective of regulating relations between the employer and employees as envisaged by the Code. Accordingly, we are of the opinion that, in the instant case, the Association's by-laws satisfy the minimum formality required by the Board.

V

In his comprehensive argument in opposition to the certification application, counsel for the employer further argues that seven positions for which the applicant purports to seek bargaining rights should, in any event, be excluded from the unit in that they serve managerial functions.

In this case, as in most cases where supervisory units are involved, the main problem arising in the certification process lies in distinguishing between management and supervisory functions. Although supervisors benefit from the protection of section 27(5) of the Code, persons who perform management functions are expressly excluded from the bargaining unit by application of section 3.

The Board described the nature of a "management function" in British Columbia Telephone Company (1977), 33 di 361; [1977] 2 Can LRBR 385; and 77 CLLC 16,107 (CLRB no. 98), as follows:

"... There are numerous functions which are recognized as being 'management functions': the preparation of the budget, decisions as to the organization of the enterprise and staffing levels, the representation of the employer in collective bargaining or in contract administration, the formulation of corporate policy, the hiring, firing, promoting and disciplining of employees, authorizing time off or overtime, etc. Some of these functions are so important that they warrant a finding that a person performs management functions even if that person exercises only a few of these functions or does so only infrequently. Others are of lesser importance and will not warrant a finding that a person performs management functions unless they represent a major component of the person's job."

(pages 376; 396; and 650)

On the other hand, in Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240), the Board described the nature of "supervisory work" as follows:

"... To say because a person is the sole supervisor present at a time or place creates a conflict because he must be the 'management presence' is to think of conflicting loyalties in an outdated framework. Many employees in innumerable circumstances act alone and perform responsible tasks. The fact they also engage in collective bargaining has no impact on their loyalty to their employer or dedication to their job. Supervision by its nature has always required persons to act as the final on-the-site authority.

The fact that employees influence corporate policy or commit an enterprise to expenditures is equally not grounds for finding a conflict. These are common characteristics of the functions of professionals. They have been given collective bargaining rights. They are also common characteristics of the functions of specialists generally, whether tradesmen, technicians or other groups of employees.

Similarly, the fact a person is a supervisor and as such directs the work of others, corrects and reprimands where necessary, allocates work among men and equipment, evaluates or assesses new and longstanding employees, authorizes overtime when necessary, calls in manpower when needed, trains others, receives training to supervise, selects persons for advancement, authorizes repairs, can halt production when problems arise, schedules holidays and vacations, verifies time worked, authorizes shift changes for individuals, and requisitions supplies when needed does not create the conflict or potential conflict that disentitles him to the freedom to associate. The loyalty and integrity of such a person is not altered by union membership or representation. ..."

(pages 90; 118; and 725-726)

Finally, in Canadian Broadcasting Corporation (1984), 55 di 197 (CLRB no. 461), the Board concludes that generally speaking, the distinction between management and supervisory functions is that the supervisor "effectively recommends" and the manager "decides which decisions are binding."

"... Given the fact that supervisors are not now excluded from the definition of employee, the dividing line between management and employee status is necessarily drawn at a higher level than that existing in jurisdictions where supervisory functions are recognized as a determining factor for exclusion. It goes without saying that if supervisors are employees, the mere existence of supervisory functions are not in themselves the basis for exclusion. The demarcation line must then be drawn by distinguishing supervisory functions from management functions. In other words, by establishing who manages the business as opposed to who supervises it. In trying to clarify the distinction between the manager and the supervisor, the Board has written the supervisor 'effectively recommends' and the manager 'decides which decisions are binding'..."

(page 214)

Based on that premise, the Board determined that supervisors acting at the first step of the grievance procedure will not be denied employee status if they decide in consultation with their supervisor or if the decision is referred to senior management.

VI

The seven positions to which the employer objects, and the current incumbents, are as follows:

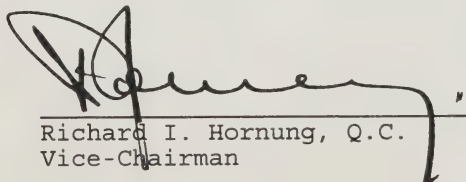
1. Manager, Technical Services - Vinnay Verma
2. Elevator Superintendent - Victor Latendre
3. Works Foreman - John Bilenduke
4. Harbourmaster - Wynford Goodman
5. Officer, Finance/Administration - Pawan Chugh
6. Grain Specialist - Dan Demeulles
7. Secretary to Operations Manager - Meaghan Church

In their preliminary discussions with the investigating officer, the parties agreed that the position of Secretary to the Operations Manager should be excluded from the unit.

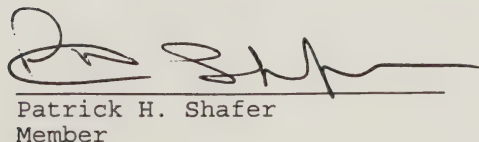
The investigating officer interviewed the incumbents of the positions in dispute at the Port of Churchill and in his report provided the Board with an extensive analysis of those positions and the work done by the incumbents. Having reviewed that report (as well as the documents provided by the parties) against the background of the jurisprudence referred to above, the Board is satisfied that the positions of Operations Manager, Secretary to the Operations Manager, as well as Manager of Technical Services and Elevator Superintendent should be excluded from the unit since employees in those positions perform managerial functions. The balance of the positions are properly within the appropriate unit.

Accordingly, the Board certifies the applicant Association as bargaining agent to represent a unit of employees described as follows:

"all supervisory personnel of Canada Ports Corporation employed at the Port of Churchill excluding the Operations Manager, Secretary to the Operations Manager, Manager of Technical Services, Elevator Superintendent and any employees currently covered by an existing certification order of the Board."


Richard I. Hornung, Q.C.
Vice-Chairman


Calvin B. Davis
Member


Patrick H. Shafer
Member

DATED at Ottawa, this 24th day of September 1993.

